

RC -- Hearing Transcript (05-20-09).txt

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONGREGATION RABBINICAL COLLEGE OF
TARTIKOV, INC., RABBI MORDECHAI BABAD,
RABBI WOLF BRIEF, RABBI HERMAN KAHANA,
RABBI MEIR MARGULIS, RABBI GERGELY
NEUMAN, RABBI AKIVA POLLACK, RABBI
KOLEL BELZ, RABBI MEILECH MENCZER,
RABBI JACOB HERSHKOWITZ, RABBI
CHAIM ROSENBERG, RABBI ARYEH ROYDE,

Plaintiffs,

v.

07 cv. 6304 (KMK)

VILLAGE OF POMONA, BOARD OF TRUSTEES
OF THE VILLAGE OF POMONA, RITA LOUIE,
IAN BANKS, ALMA SANDERS-ROMAN,
BRETT YAGEL, NICHOLAS SANDERSON

as Mayor,

Defendants.

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U.S. Courthouse
White Plains, N.Y.
May 20, 2009
3:00 p.m.

Before: HON. KENNETH M. KARAS,
United States District Judge

APPEARANCES

PAUL SAVAD & ASSOCIATES
BY: PAUL SAVAD, Esq.
55 Old Turnpike Road, Suite 209
Nanuet, N.Y. 10954
Attorney for Plaintiffs

LENTZ STEPANOVICH & BERGETHON, PLC
BY: JOHN G. STEPANOVICH, Esq.
448 Viking Drive, Suite 370
Virginia Beach, VA 23452
Attorneys for Plaintiffs

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STORZER & GREENE, PLLC
BY: ROMAN P. STORZER, Esq.
1025 Connecticut Avenue, Northwest,
Suite 1000

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Washington, D.C. 20036
Attorneys for Plaintiffs

ROBINSON & COLE, LLP
BY: WILLIAM J. KELLEHER, III
1055 Washington Boulevard, 9th Floor
Stamford, CT 06901-2249
Attorneys for Defendants

DORIS F. ULMAN, Esq.
134 Camp Hill Road
Pomona, N.Y. 10970

BENJAMIN N. CARDOZO SCHOOL OF LAW
YESHIVA UNIVERSITY
BY: MARCI A. HAMILTON, Esq.
Brookdale Center
55 Fifth Avenue
New York, N.Y. 10003
Attorneys for Defendants

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Official Court Reporter

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1 THE CLERK: 07 Civil 6304, Congregation Rabbinical
2 College of Tartikov v. the Village of Pomona.

3 Counsel, please state your appearances.

4 MR. STORZER: Counsel for the plaintiffs, Roman
5 Storzer, Storzer & Greene.

6 THE COURT: Good afternoon, Mr. Storzer.

7 MR. STORZER: Good afternoon, Judge.
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8 MR. STEPANOVICH: John Stepanovich, Your Honor.

9 THE COURT: Good afternoon.

10 MR. SAVAD: Paul Savad for plaintiffs.

11 THE COURT: Good afternoon.

12 MS. HAMILTON: Marci Hamilton for the defendants.

13 THE COURT: Good afternoon.

14 MR. KELLEHER: William Kelleher also for the
15 defendants. Good afternoon, Your Honor.

16 MS. ULMAN: Doris Ulman, attorney for the Village
17 of Pomona.

18 THE COURT: All right. Good afternoon.

19 Please have a seat everybody.

20 well, two things. One is, I want to tender an
21 apology for my having to postpone the last argument. I
22 actually winded up with a virus the weekend before, which
23 prevented me from being prepared. And I think, as you all
24 know, I don't do these unless I am prepared, because I know
25 you all are prepared. But it's not something that I like to

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1 do and I realize that I have upset the apple cart,
2 particularly for those who had to travel, so I do apologize
3 for that.

4 The second thing is, I want to thank counsel for
5 very well prepared submissions and very helpful submissions.
6 So I have read them and I have read the exhibits. I have
7 read a ton of cases. But I also don't have a little red
8 light that goes off after five minutes. So, you know, we
9 don't have a super tight time limit, but we also want to
10 avoid repetition. So, the defendants are movants, so I don't

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11 know how you all want to break this up, but you get to go
12 first.

13 MS. HAMILTON: Okay. All right. Your Honor, I
14 will be arguing for the defendants in total.

15 THE COURT: Okay. All right.

16 MS. HAMILTON: Well, let me just begin, Your Honor,
17 by saying that the project that's been proposed --

18 THE COURT: You should stand up.

19 MS. HAMILTON: You want me to stand --

20 THE COURT: Yes. It's better.

21 MS. HAMILTON: -- even though this is pretty low?

22 THE COURT: Well, yes. We can move that over.

23 MS. HAMILTON: This is fine.

24 THE COURT: Okay. All right.

25 MS. HAMILTON: The project that's been proposed by

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1 inference here, that we don't have any concrete notion of
2 what's actually on the minds of the plaintiffs other than
3 their Second Amended Complaint, which lists places of
4 worship, schools, religious courts, libraries, and housing
5 for families.

6 Given the numbers that have been batted around,
7 they are proposing essentially imposing Wake Forest
8 University in Pomona without any kind of application process.
9 And it's the position of the defendants that there is no
10 ripeness and certainly no futility argument until at least
11 one application has been filed.

12 THE COURT: Okay. What's the -- one of the things
13 I really want to get into the weeds on is, and I have been

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14 trying to get into it myself here, is what the application is
15 that you think plaintiffs need to have made here?

16 Because their argument is, is that, in effect, the
17 only fix is a legislative one and they don't think that the
18 law requires them to do that.

19 So, you know, if you can break it down between the
20 wetlands and some of the 130 definitions, and where in the
21 local law or Code that you think lays out the road map for
22 plaintiffs as to what they should have done here.

23 MS. HAMILTON: Well, Your Honor, in our reply
24 brief, on Pages 6 through 8, we suggest what it is that they
25 could have done, and we divided it into the accreditation

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1 issue and all of the other issues.

2 THE COURT: Okay. But the accreditation has
3 nothing to do with an application that they make to you.

4 I mean, basically, what you are saying to them is,
5 they got to be accredited, they got to be Wake Forest or they
6 can't have their college here.

7 MS. HAMILTON: Well, but actually --

8 THE COURT: But where did it -- where -- you know,
9 the application in terms of the futility case law assumes,
10 for example, you ask for a variance or something like that.

11 Is there any room in the Code that says, "we don't
12 have to be accredited, please exempt us from this
13 requirement"?

14 MS. HAMILTON: Well, they could certainly apply for
15 a variance from the accreditation requirement and the text
16 amendment from, from that requirement.

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17 THE COURT: Okay. And where exactly in the local
18 law can they ask for a variance from the accreditation
19 requirement?

20 MS. HAMILTON: I'm gonna have to ask Doris to --

21 THE COURT: Okay.

22 MS. HAMILTON: -- Ms. Ulman, to be specific about
23 these issues.

24 THE COURT: Ms. Ulman, please.

25 MS. ULMAN: Your Honor, there is a provision in
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1 the -- there is a provision in the zoning law --

2 THE COURT: What provision?

3 MS. ULMAN: -- itself. I would -- it's in Chapter
4 130 --

5 THE COURT: Okay.

6 MS. ULMAN: -- towards the end, that has a
7 provision for amendments to the law, which is the provision
8 that permits applications for zone changes, which is really
9 what the applicant should be applying for.

10 THE COURT: Okay. I mean, I see 130-28 deals with
11 the powers and duties of the Zoning Board of Appeals and then
12 it discusses in Sub D of that variances.

13 MS. ULMAN: Your Honor, I am not suggesting
14 variances.

15 THE COURT: Okay.

16 MS. ULMAN: I am not suggesting the Zoning Board of
17 Appeals, because --

18 THE COURT: Okay. Tell me. I really need the
19 specifics. Tell me where in the ordinance.

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20 MS. ULMAN: Unfortunately, I don't have the local
21 law with me.

22 THE COURT: I have got it right here. If you want,
23 if you want to plow through it, it's yours.

24 MS. ULMAN: Let me look at it.

25 But, in addition to that, Your Honor --

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1 THE COURT: Yes.

2 MS. ULMAN: -- State law, in the Village Law of the
3 State of New York, Chapter 7, which deals with zoning and
4 building requirements, specifically permits applicants to
5 make applications to the local municipality for zone changes.
6 Those -- that is clearly stated and always has been permitted
7 not only in Pomona but throughout the State of New York.
8 Pomona does provide for it, as I have indicated, in one of
9 our chapters, and I would certainly like to look at it.

10 THE COURT: Yes. Yes. Help yourself.

11 MS. HAMILTON: Your Honor, if I may ask. I mean
12 your questions are a little surprising, because they seem to
13 presume that futility could possibly be proven in this case.

14 When the Supreme Court came -- reversed the Second
15 Circuit --

16 THE COURT: whoa, whoa, whoa. But my whole job is
17 to surprise you and to play devil's advocate.

18 MS. HAMILTON: Well, that's fine. That's fine.

19 THE COURT: Okay.

20 MS. HAMILTON: Go on.

21 THE COURT: I mean, if I just came in here and
22 asked a bunch of softball leading questions, there is no
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23 point, plus it wouldn't be very much fun.

24 MS. HAMILTON: Well, then, let me try.

25 THE COURT: Well, I am assuming for the sake of

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1 argument that, that futility -- I mean futility gets broken
2 down into one or two things. Either that the local authority
3 doesn't have the authority to grant the request that a
4 plaintiff might make or they have dug in their heels, right?

5 And that's, that's right out of the Second Circuit
6 cases on this, starting with Murphy. So --

7 MS. HAMILTON: With all due respect, Your Honor,
8 there are no cases in which futility has been found in which
9 not a single application has been filed for anything.

10 The only cases in which futility has been found are
11 Ninth Circuit cases, there are four of them, and in every one
12 of them it's either an application or a third or a fourth
13 application has already been filed.

14 THE COURT: Okay.

15 MS. HAMILTON: So futility does not fly here.
16 There is no application, nothing. It's hypothetical what we
17 are talking about.

18 THE COURT: But -- I understand that.

19 MS. HAMILTON: And it's impossible --

20 THE COURT: Hang on, hang on, hang on, please.

21 MS. HAMILTON: Okay.

22 THE COURT: Murphy, I don't read Murphy to say that
23 futility only kicks in if you have made one application.

24 I read Murphy to say that while futility certainly
25 is a very, a very tough burden for a plaintiff to meet, that

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1 there are two instances where even in the absence of one
2 application somebody could establish futility. And as I
3 said, either a lack of authority by the local entity, the
4 municipality or whatever it is, or the defendants, the
5 municipal officials have dug in their heels. And you know
6 plaintiffs rely on really both, but certainly no shortage of
7 allegations with respect to digging in of heels.

8 MS. HAMILTON: Look, there are generalized claims,
9 but there is nothing that rises to the level of what's
10 required by the Supreme Court on Tuesday in the Iqbal case --

11 THE COURT: Okay.

12 MS. HAMILTON: -- which reversed the Second Circuit
13 and made it very clear that those kinds of generalized
14 plausibility claims are not enough, there must be facts, and
15 here there are none. There is discussion about outsiders,
16 which is what the Iqbal decision rejected as a basis for
17 relief.

18 THE COURT: Really? You don't think that the Mayor
19 campaigning on a promise to basically stop the plaintiffs'
20 community and those who want to establish the college, you
21 don't think that those allegations aren't specific?

22 I mean, you know, the problem with Iqbal was, there
23 was, you know, according to the Supreme Court -- and it was
24 five to four -- not enough specific allegations as to
25 Attorney General Ashcroft and Director Mueller.

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1 MS. HAMILTON: Well --

2 THE COURT: That, you know, they are way up in the
3 food chain here. Now, with all due respect to the Mayor,
4 there is not -- you know, the Attorney General oversees
5 80,000 employees, and so on and so forth.

6 This is a small town. You have got a Mayor and a
7 couple of other folks running for office on a platform that
8 plaintiffs allege was explicitly directed with hostility
9 towards them, to make sure that they basically don't get to
10 do anything in the town, let alone this college.

11 MS. HAMILTON: Well, with all due respect, there's
12 not a single statement --

13 THE COURT: You didn't need to preface that,
14 and I --

15 MS. HAMILTON: But there is not a single statement
16 in the Complaint about hostility toward the religion. There
17 may have been hostility toward an incredibly intense use, but
18 that's very different.

19 THE COURT: Intense use of -- really, that this is
20 all about real estate and not individuals?

21 MS. HAMILTON: This is all about -- absolutely,
22 it's about intensity of use.

23 And may I quote from Iqbal? What the court said
24 was that, "where a Complaint pleads facts that are merely
25 consistent with the defendant's liability, it stops short of

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1 the line between possibility and plausibility of entitlement
2 to relief."

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3 It's not enough to throw a few allegations out and
4 say, "oh, that would be consistent with discrimination."
5 They need to show intentional discrimination in some fact,
6 and the quotes that they have from the public actors in this
7 case are not discriminatory toward any religious group.

8 You have to -- the only way to rule in their favor
9 is to rule on their atmospherics and not their facts.

10 THE COURT: Hang on. And putting aside the history
11 of not only the Village's creation, and putting aside for a
12 moment the temporal proximity between the adoption of some of
13 these zoning requirements and when it is that the plan sort
14 of leaks out, because I recognize that that may not in and of
15 itself be enough, but those are all -- those so-called
16 atmospherics nonetheless provide context. And, of course,
17 the Court is required at this stage of the proceedings to
18 assume the truth of all of the allegations in the Complaint.

19 You want -- where is the quote where "I have to be
20 careful what I say because my lawyers tell me"?

21 MS. HAMILTON: In the, in the Second Amended
22 Complaint?

23 THE COURT: Yes. It's Paragraph 206.

24 MS. HAMILTON: Yes.

25 THE COURT: But there is other quotes too, but

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1 206 -- hang on. No, this isn't the one I was looking for.

2 MR. STEPANOVICH: Your Honor, if I may, would it be
3 Paragraph 11 in Exhibit N, Laura Kraemer's affidavit?

4 THE COURT: Yes. I mean I was -- I'm going off of
5 the Complaint.

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MR. STEPANOVICH: Oh.

THE COURT: Because I mean, obviously -- here we go. All right.

So, this is the Mayor Marshall comment. "Ladies and gentlemen, let me say something. We sitting at this table have limitations that are placed on us as to what we can say, and what we can't say, because our attorney tells us what we can say and what we can't say.

"I can't say what I feel. I can't. If I agree with you, I don't agree with you, I don't have that luxury of being able to say that here. All that I can say is that every member of this Board works very, very hard to do what is best for this community. You have your issues. Don't assume because no one has gotten up and said, "wow, I agree with you, oh boy;" don't assume that because we didn't do that, that we don't agree."

And what's important about that statement is because it's connected in the Complaint to other statements that are made by people in the community who aren't talking about intensity. They are talking about their concern about

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a certain group of people being in their community.

MS. HAMILTON: Your Honor, I would disagree with that. Which paragraph are you quoting from?

THE COURT: 166 of the Amended Complaint.

MS. HAMILTON: 166. The specific quotes from the community that --

THE COURT: Well, 165 talks about community opposition being displayed through public comment at the

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9 hearing regarding the dormitory legislation, that was mostly
10 targeted at Hasidic Jews in general and at the Rabbinical
11 College in particular.

12 MS. HAMILTON: So, Your Honor, are you suggesting
13 that the Mayor's statement --

14 THE COURT: It's not a question of what I'm
15 suggesting. It's a question of what's alleged in the Amended
16 Complaint.

17 MS. HAMILTON: Well, I understand that, but it
18 doesn't strike me as his agreement with those targeting the
19 Hasidic Jews, although, I know that's what they want everyone
20 to infer. I mean, what I think --

21 THE COURT: Really? I mean, if it were really
22 about intensity, why would he be worried about lawyer's
23 advice?

24 what person -- what publicly elected official is
25 worried about what he or she might say about how "we don't

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1 want Wake Forest in our town"? Really?

2 I mean, I'm trying to imagine that scenario,
3 particularly in the context of people who are alleged,
4 according to the Amended Complaint, to have made comments
5 based on the race and religion of the people who are making
6 the -- who are about to make or are talking about making a
7 proposal to use the subject property for.

8 MS. HAMILTON: No government official makes any
9 race or religious statements.

10 THE COURT: No. They are careful based on what
11 their lawyers have told them, not to make it explicit. But

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12 what the Mayor is saying there is, "don't think just because
13 I don't -- I am not standing up and saying that I agree with
14 you that I don't agree with you."

15 And to the extent the allegation is that what's
16 being said here is directed at plaintiffs because of their
17 race and religion, I don't understand why you think, at least
18 for purposes of assuming what's alleged to be true in the
19 Complaint to be true, that that doesn't put into context,
20 when you tie in the history and temporal proximity in terms
21 of the adoption of these things, and people running on a
22 platform that they run on, that it doesn't get plaintiffs at
23 least, at least to second base, let alone first, which is all
24 they got to do, to say, "this is, this is motivated for --
25 based on improper reasons."

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1 MS. HAMILTON: But the platform was not based on
2 race or religion at all. There was no statement with regard
3 to race or religion.

4 The platform was based on the largest property,
5 which is what the Second Amended Complaint concedes, it's the
6 largest piece of property in the community, and the attempt
7 to bring in a very large intense project. Now, this is a
8 town with 2,700 people. A project that's being proposed
9 through the airwaves, not through any plan, of 4,500 people.
10 And towns all the time object to intensity. They object to
11 Wal-Marts. They object to large buildings. They object
12 to -- developers routinely don't get what they ask for and
13 they routinely get slammed in the public process.

14 It's unthinkable. Public officials don't --

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15 THE COURT: I don't disagree with you. I don't
16 disagree with you that that's what happens in some towns.
17 I am not interested in what happens in some towns.
18 I am interested in looking at the allegations in the Amended
19 Complaint, taking them as I must, as being true, and trying
20 to figure out how that plays into this. But let's get, let's
21 get back to this, because it relates to futility.
22 To the extent that plaintiffs are alleging that
23 defendants have dug in their heels, which is the second piece
24 of futility recognized by, by Murphy, and then trying to
25 understand exactly the mechanics of this --

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1 I mean, like I said, I think it's very important
2 for me to understand, because I am no expert in this area of
3 the law at all. I don't think there is any area I am an
4 expert in, but I do my best.
5 -- what it is you would want plaintiffs to do, to
6 go to what entity, invoking what authority, and say, "here is
7 the application we want them to make."
8 MS. ULMAN: Your Honor.
9 THE COURT: Please.
10 MS. ULMAN: It's very clear in Article 11 of
11 Chapter 130 -- and I will give it back to you as soon as I
12 refer to it, if you would.
13 THE COURT: Okay.
14 MS. ULMAN: If you don't mind.
15 THE COURT: Sure. Go ahead.
16 MS. ULMAN: In that chapter, it sets forth the
17 procedure for applying for an amendment to the zoning law,

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18 including any amendment to a use or a district.

19 So that if the applicants wanted to change the law
20 with respect to the accreditation, for example, which is one
21 of their issues, they would petition the Board of Trustees,
22 go to a public hearing, and the Board would make a
23 determination, a SEQRA determination, which would be the
24 environmental portion of it --

25 THE COURT: Right. Yes.

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1 MS. ULMAN: -- and then a decision on the zone
2 change. If they --

3 THE COURT: Is that what it's called, though?

4 Is it a zone change or it's an amendment?

5 MS. ULMAN: Yes, it's an amendment to the zoning
6 law. We call it a zone change.

7 THE COURT: Okay.

8 MS. ULMAN: But it's -- it would be an amendment to
9 the law, which now does not permit unaccredited schools.

10 THE COURT: Okay. And --

11 MS. ULMAN: We do permit dormitories on school
12 properties. That is not the problem.

13 THE COURT: No. I understand that. But the
14 definition of dormitory is one that restricts plaintiffs from
15 the type of dormitory that they want to have on the subject
16 property. But just so I understand, this is different than a
17 variance?

18 MS. ULMAN: Yes, it's not a variance.

19 THE COURT: All right. And what's the difference?

20 MS. ULMAN: All right. A variance under State law

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21 requires -- a use variance, which this would be, requires a
22 specific standard that this applicant cannot meet. And that
23 major standard, which is set forth by the New York State
24 Court of Appeals, the primary standard is that you cannot get
25 a reasonable return on your investment without the variance,

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1 so -- and Mr. Savad and I have discussed this on the phone.

2 THE COURT: Yes, but I think it's reflected in the
3 letters.

4 MS. ULMAN: Right.

5 THE COURT: He acknowledges he can't get a
6 variance.

7 MS. ULMAN: Yes. And he agrees and I agreed that
8 it would be wasteful for them to apply for a variance.
9 However, it is not wasteful for them to apply for a zone
10 change, because that's a completely different standard and
11 it's a completely different --

12 THE COURT: What is the standard under Section 11
13 there of 130?

14 MS. ULMAN: The standard under State law is
15 basically that zone changes are permitted if they are in the
16 public interest. That is the criteria.

17 THE COURT: And, in this instance, it's obviously
18 not a State government entity that makes that decision. It
19 will be --

20 MS. ULMAN: It will be the Village, the Village
21 government.

22 THE COURT: -- the village itself.

23 MS. ULMAN: Yes.

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24 THE COURT: And so it would decide whether it's in
25 the public interest or it would decide whether or not it's

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1 consistent with the interests protected by the zoning rules,
2 the Code?

3 MS. ULMAN: The law is pretty clear, Your Honor,
4 that the -- in order to grant a zone change, there must be --
5 it must be in the public interest.

6 THE COURT: Okay. Is that the only thing the
7 plaintiffs can do here?

8 MS. ULMAN: If they want -- well, again, we still
9 don't know exactly what they want.

10 THE COURT: I understand that.

11 MS. ULMAN: If they wanted --

12 THE COURT: But let's assume, let's assume they
13 want the world. What would they have to do to get the world?

14 MS. ULMAN: If they wanted a college --

15 THE COURT: Right.

16 MS. ULMAN: -- with dormitories.

17 THE COURT: Wake Forest. We've got the analogy,
18 without the basketball team.

19 MS. ULMAN: They might even get the basketball
20 team.

21 THE COURT: Well --

22 MS. ULMAN: But, in any event, if they came with a
23 college and dormitories that met the requirements of the law,
24 then all they have to do is apply for site plan approval to
25 our Planning Department.

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1 THE COURT: When you say comply with, comply with
2 what? You mean the accreditation piece of this?

3 MS. ULMAN: Well, if they were complying with the
4 provisions of the zoning law relating to the accreditation
5 and --

6 THE COURT: But what if -- but their point is they
7 can't get accredited. And, so, can they come, can they
8 come --

9 MS. ULMAN: Then the only other alternative is the
10 amendment to the zoning law to permit them to do what they
11 want to do. They can apply for that to the Board of
12 Trustees --

13 THE COURT: Okay.

14 MS. ULMAN: -- and it's not a very difficult
15 procedure.

16 THE COURT: But is that in effect a request for
17 them to change the law, or --

18 MS. ULMAN: Yes, it is. Because at the present
19 time the zoning law of the Village does not permit --

20 THE COURT: Right.

21 MS. ULMAN: -- presumably, does not permit what
22 they want to do.

23 THE COURT: Okay. Putting aside the accreditation,
24 let's assume accreditation wasn't an issue, then what will be
25 the other steps that plaintiffs can take here?

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1 MS. ULMAN: If accreditation was not an issue, I
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2 believe --

3 THE COURT: Could they go to special use?

4 MS. ULMAN: They would go to site plan first with
5 the Planning Board --

6 THE COURT: Uh-huh.

7 MS. ULMAN: -- and then the special permit with the
8 Board of Trustees.

9 THE COURT: The SUP as you all call it.

10 MS. ULMAN: A permitted -- a special permit is a
11 permitted use subject to certain additional conditions based
12 on the intensity of the use.

13 THE COURT: Okay. Aside from accreditation here,
14 though, because there is a bunch of other pieces of law. You
15 have got the wetlands piece of this. I mean --

16 MS. ULMAN: But I -- Your Honor, with all due
17 respect, I don't think the wetlands piece of it applies to
18 them at all. They have got a very large piece of property.
19 They have plenty of room to build.

20 THE COURT: Okay, okay.

21 MS. ULMAN: I don't see the wetlands --

22 THE COURT: All right. So, but the definition of
23 dormitories, for example, could they get, could they get a
24 special use even though there is that definition in Section
25 130?

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1 I forget which provision it is of 130. But can
2 they, can they go and say, "here are the reasons why we want
3 to not be restricted by that definition"?

4 MS. ULMAN: I don't know what portion of the
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5 dormitory law they object to.

6 THE COURT: The part that says no kitchens and
7 multifamily, plus there is the space constriction in terms of
8 how much of the dorm space can take up of the land.

9 MS. ULMAN: If they are asking for apartments --

10 THE COURT: Yes.

11 MS. ULMAN: -- as dormitories?

12 THE COURT: Yes.

13 MS. ULMAN: Then they need the --

14 THE COURT: Amendment.

15 MS. ULMAN: -- the amendment to the zoning law.

16 THE COURT: Okay. So, what it really comes down to
17 is the amendment.

18 MS. ULMAN: Yes. It's not too difficult.

19 THE COURT: Okay. And their argument -- well,
20 maybe we will go back, Ms. Hamilton, to you.

21 Okay. Are you done with that?

22 MS. ULMAN: Yes.

23 THE COURT: That will be great. Can you -- did you
24 leave it there, so I can put a Post-It on it?

25 MS. ULMAN: Right there.

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1 THE COURT: Okay. Because my little brain isn't
2 going to remember, so we have to use this Post-It.

3 MS. ULMAN: Okay.

4 THE COURT: All right. So, Ms. Hamilton, there you
5 go. So, the argument is, looking at this particular
6 provision, then you get an amendment.

7 MS. HAMILTON: Right.

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8 THE COURT: Short of that, I am not sure what it is
9 plaintiffs could have been done here.

10 MS. HAMILTON: Well, I mean, that's a standard
11 operating procedure in land use plans. It happens all the
12 time.

13 THE COURT: Okay. So you say that's enough.

14 MS. HAMILTON: At the very least, they should do
15 that. I mean, it has to be that the local government has to
16 see a plan before bringing in such an intense use. I mean,
17 it's just very simple land use principles that are recognized
18 across the country.

19 As I said, there is not a single futility case
20 where there wasn't one application somewhere trying to ask
21 for something, so that everybody knew what they were talking
22 about. I mean, we are hamstrung by trying to answer your
23 questions on procedure, because we don't know what they want.

24 We know what they thought what they want, but the
25 Amended Complaints are different in terms of whatever

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1 concrete requirements they have. They say they have spent a
2 tremendous amount of money, all sorts of experts, and the
3 only people who don't know anything about it are the
4 officials and the public.

5 So, one of the crucial aspects here is this is not
6 just about the village officials and the village and the
7 plaintiffs. It's also about the public that has a right to
8 public hearings through any of the procedures that you have
9 just heard described.

10 THE COURT: Mm-hmm.

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11 MS. HAMILTON: So, our position is simply one
12 application in some way that will give people some basis to
13 talk about it. Now, you had earlier said --

14 THE COURT: Now, just one quick thing, by the way,
15 and maybe you are not the right person to answer this. But
16 is there a time limit?

17 I mean, can the village just sit on this for three
18 years? Or is it -- because there are some provisions in
19 here, for example, if you want a special use, there is -- I
20 forget. It's basically 120-something days soup to nuts.

21 Is there a similar provision in here on amendments?

22 So, if they make a petition for amendment, and then
23 you guys say, "oh, we will put that to the bottom of the
24 pile. We are going to first worry about, you know,
25 basketball courts in another part of the town."

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1 MS. ULMAN: There are time limits on the SEQRA
2 portion, the Environmental Review Board, as well as on the
3 decision-making.

4 THE COURT: Okay. Yes. I think it looks like it's
5 130-39 seems to have a --

6 MS. ULMAN: Right.

7 THE COURT: -- basically, failure of the Planning
8 Board to report within 45 days shall be construed as
9 approval.

10 Okay. All right. Go ahead, Ms. Hamilton.

11 MS. HAMILTON: Just a few things you said
12 quickly --

13 THE COURT: Yes.

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14 MS. HAMILTON: -- which is great. The village's
15 creation, Pomona's creation is over 40 years ago. It's not
16 Airmont's creation, which was in '90, and which was clearly
17 related to Jewish entrance into the community. It was all
18 about being opposed to condos that had no religious
19 affiliation. It was about creating a bedroom community.

20 There is nothing in the Complaint that indicates
21 that Pomona's founding is part of some --

22 THE COURT: No. I understand that. I understand
23 that.

24 MS. HAMILTON: Well, Pomona is the defendant here.

25 THE COURT: No. I got that.

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1 MS. HAMILTON: It's not Ramapo.

2 THE COURT: I got that.

3 MS. HAMILTON: And if you take out -- I mean, what,
4 what the court in Iqbal said is that there are all sorts of
5 claims against other defendants. Here we got all sorts of
6 claims against people that aren't even part of the lawsuit,
7 that aren't our --

8 THE COURT: Well, but there are lots of, there are
9 lots of statements attributed to Pomona residents, whether
10 they are public statements or they are statements written in
11 to the Journal News. And there are some, some eye-opening
12 statements that are, that are not subtle and did not have
13 anything to do with density.

14 MS. HAMILTON: Well --

15 THE COURT: So --

16 MS. HAMILTON: The problem is, is that, private

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17 individuals have a First Amendment right to say whatever they
18 want. The Village cannot tell them they can't talk.

19 THE COURT: I get that. And I get that these
20 unnamed individuals, maybe some of whom may give up their
21 names to the Journal News are not defendants and they don't
22 speak on behalf of Pomona.

23 But my point is that some of the comments that are
24 attributed to the leaders of Pomona, saying basically, "don't
25 worry, I hear what you're saying. Even though I'm not going

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1 to say explicitly I agree with you, because I can't say it
2 explicitly, because then I'm going to end up in a federal
3 lawsuit. But" -- wink, wink -- "just because I'm not saying
4 I agree with you, it doesn't mean I don't agree with you."

5 MS. HAMILTON: Well, but the problem is, is that
6 the standard is, does the government, under Iqbal, have a
7 policy of discrimination?

8 It's not motivation. Motivation is not, is not
9 questioned here. The question here is whether or not the
10 government has set up a policy of discrimination against an
11 entity, a group. And our position --

12 THE COURT: But that's the whole point of
13 discrimination cases, what is the person's motive. Why was
14 the -- put it in the Title VII context. Why was the
15 plaintiff fired? Well, because she was a she. And that's
16 the whole point, that's the whole ballgame as to whether or
17 not they were motivated by gender bias.

18 MS. HAMILTON: Well, and under the Second Circuit's
19 ruling in the Iqbal case, that would be the standard, but

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20 under the Supreme Court's rejection of that standard, there
21 must be facts that go to the actual defendants showing they
22 had an actual policy.

23 THE COURT: Okay. But Iqbal, I mean you are
24 trying, you are trying to get too much out of Iqbal.

25 Iqbal comes down to the fact that plaintiffs didn't

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1 allege enough as to Ashcroft and Mueller, period.

2 MS. HAMILTON: Right.

3 THE COURT: Okay. So, if your argument is that
4 there is not enough specific allegations against Mayor
5 Sanderson, then we can have that conversation, but your
6 argument is much broader than that.

7 Your argument is, you are starting off by saying
8 futility does not apply here. Because they didn't apply for
9 anything, this case is simply not ripe. That's your
10 argument, right?

11 MS. HAMILTON: It's one of them, yes.

12 THE COURT: Okay. I mean, but that applies to
13 every defendant.

14 MS. HAMILTON: Well, not really. I mean for one --

15 THE COURT: I would think it would. You would say,
16 "throw the case out, Judge, because it's not ripe."

17 MS. HAMILTON: Well, if -- yes, and that's exactly
18 what's happening in other cases around the country involving
19 RLUIPA, because they are bringing claims before they are
20 filing applications. I mean it's exactly what happened in
21 the Roosevelt case, and the district court ruled that it was
22 not ripe because they had not brought a claim and nobody knew

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23 exactly what it was that they wanted to accomplish. And so,
24 yes, if that's, if that's the scenario.

25 But my point about futility is that the futility

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1 exception, to the extent it exists, has only ever been
2 vindicated in the Ninth Circuit and only when it's a
3 reapplication question, never when it's the initial
4 application. And for federalism purposes, as well as other
5 reasons, local governments should be able to get an
6 application. RLUIPA's legislative history says it. The
7 cases across the country, Morgan Hill, C.L.U.B., all of these
8 cases say they have got to file something.

9 THE COURT: What -- look, if that's true, then what
10 to do with the language of digging in their heels?

11 Because Murphy doesn't say you only look at digging
12 in their heels after one application.

13 MS. HAMILTON: Well, that is dictum, and I
14 litigated Murphy.

15 THE COURT: Yes, but you didn't write it, so.

16 MS. HAMILTON: Well, I did not write it.

17 THE COURT: Okay. So, I have got to go with what
18 they wrote.

19 MS. HAMILTON: But that is a line out of Murphy
20 that was --

21 THE COURT: It was applied in Westchester Day
22 School, cited not as dicta. Certainly, other district court
23 decisions have considered it, not as dicta, but have found
24 that it didn't -- either did or didn't apply.

25 And in a motion to dismiss, where plausibility is

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1 the standard, why is it -- why can't it be said that the
2 plaintiffs -- I mean, does plausibility apply to this piece
3 of futility I guess is my question?

4 what would the plaintiffs have to establish on
5 digging in their heels, absolute certainty, or at least a
6 plausible claim of digging in their heels?

7 where do you think it is on a continuum?

8 MS. HAMILTON: Well, I think they would have to
9 show a plausible claim based on fact. They can't just say
10 that every -- it's interesting if you read the Complaint
11 carefully, because what they do is, they talk about the land
12 use determinations, the zoning changes, et cetera, that have
13 been made, and instead of talking about the fact they are
14 neutral and generally applicable, they say that they were
15 enacted solely to get to plaintiffs, solely to get to
16 religion. They don't have any evidence of that.

17 THE COURT: But temporal proximity is fair game.
18 And, again, in the employment context, "I got fired two
19 months after I complained about the discrimination against
20 me," and the cases say that's enough to state a claim for
21 employment -- for retaliation.

22 MS. HAMILTON: It's not enough if you were never
23 employed there. We are talking about the threshold question.

24 THE COURT: Okay. But the allegation is that soon
25 after the plan leaked, all of the sudden, this town starts

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1 adopting all of these changes to the zoning laws, which, you
2 know, if you add them up is checkmate.

3 I mean, their view is, "we can't, we can't even
4 start with the idea that we had, because of all these things
5 that have been adopted by the town." I mean, you can't
6 seriously suggest that it was coincidence that these things
7 were adopted when they were adopted.

8 Your argument is, it had nothing to do with any
9 improper animus, it was intensity. Okay. So, the temporal
10 proximity is a fact from which a reasonable inference can be
11 drawn that these things were adopted in response to what the
12 town heard the plaintiffs wanted to do.

13 So, then, it's just a battle over whether or not
14 the adoption of these is a town, you know, acting properly to
15 protect against intensity in its bedroom community or whether
16 it contravenes RLUIPA and the various provisions of the State
17 and Federal Constitutions.

18 MS. HAMILTON: The problem, Your Honor, is that in
19 every land use process, people come in with very ambitious
20 plans all the time, and the land use process is created so
21 that ambitious plans are made to fit with the community.

22 Here, what we are dealing with is an argument that
23 an extremely ambitious project can come in and be set down on
24 top of the community without the community having any input
25 whatsoever in public hearings on a plan and without the

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1 community having their elected representatives decide if it's
2 consistent with the plan.

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3 This is a -- whatever the plan is, it's

4 complicated. There are aspects of it that are permitted,
5 like libraries. There are aspects of it that are permitted,
6 like dormitories of a certain breed but not of others.

7 There are aspects that are -- if they wanted to,
8 they can have 90 homes on their hundred acres. They can have
9 ten synagogues. All --

10 THE COURT: That's not what they want.

11 MS. HAMILTON: Your Honor --

12 THE COURT: They want this college and there are
13 certain practicalities that make 90 homes as the dorms not
14 work, because it's going to cut down dramatically on the
15 number of people they can educate and train.

16 MS. HAMILTON: That's right, and that's why the
17 land use process works to create a result that everybody has
18 some input into.

19 THE COURT: Right. What, what does Pomona care as
20 to whether or not the institution is accredited?

21 What's Pomona's interest in this?

22 This land use process is a land use process, but
23 why do they care if it's accredited or not?

24 I'm glad you think the question is funny. Why do
25 you care?

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1 MS. HAMILTON: I am stumped. Accreditation is an
2 indication that it is not a covert business being run, that
3 it is not a for profit activity. I mean, this is --

4 THE COURT: Clearly, nobody thinks that this is a
5 covert business. Is that really what you guys think?

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No. Okay.

MS. HAMILTON: It doesn't matter what we think,
it's what the Complaint says.

THE COURT: Well, even the Complaint says why, why
you don't care about this. Go ahead.

MS. ULMAN: Do you mind?

MS. HAMILTON: No.

MS. ULMAN: Your Honor, that comes right out of
State law. It's a general provision. Everybody uses it.

THE COURT: But, then, why do you wait until after
you heard about this plan to adopt this law?

MS. ULMAN: We liberalized the law with respect to
religious uses and schools.

Dormitories were never permitted prior to the
adoption of this law. That's why I am at a loss to
understand how they can -- Mr. Savad comes to many of our
meetings. These laws were liberalized with respect to the
uses for religion and for schools. They were not in any way
a result of, of this particular school coming in or this
particular use.

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THE COURT: So the timing was coincidental in terms
of your liberalizing the dorm laws?

MS. ULMAN: Prior to -- we started working on them,
I believe, in 2005, and we made gradual changes --

THE COURT: But this is after --

MS. ULMAN: -- in 2007.

THE COURT: This is after the plaintiffs' plan
coming out there and the word on the street, right?

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MR. STORZER: After we purchased the property, Your

Honor.

THE COURT: Yes.

MS. ULMAN: Your Honor, I did not -- the laws that were, that -- in fact were proposed by, by me when I became the Village Attorney.

THE COURT: Mm-hmm.

MS. ULMAN: And these are -- the ones that were adopted are very similar to laws that municipalities have adopted throughout the State of New York and they in no way were a result of either the plaintiffs' purchase or discussions. And, again, we really didn't know what they -- we didn't -- I personally did not know they were not accredited until much, much later, during the conversation with Mr. Savad.

THE COURT: You mean that they could not be accredited?

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MS. ULMAN: That they were not accredited.

THE COURT: Were not accredited. You assumed they were?

MS. ULMAN: I assumed they were.

THE COURT: Okay, okay. Okay. Anything else you want to address with respect to the ripeness issue?

I mean, how about whatever you want to talk about.

MS. HAMILTON: Well, the -- our position boils down to, it's pretty simple, one application, that's, that's really all that the Village is asking for, so there is something concrete for the public to discuss and to consider

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12 in light of what appears to be a very intense use.

13 Neither RLUIPA nor the First Amendment provide a
14 carte blanche to have whatever project you want put in any
15 community you want under any zoning you like. That is just
16 not what the law says, and all the interpretations of RLUIPA,
17 even the broad ones, have not gone that far. So,
18 essentially, what's happening here is that the plaintiffs are
19 trying to push the envelope.

20 THE COURT: Okay. If you are right, that still at
21 most takes out some of the as-applied challenges, doesn't it?

22 I mean why -- well, let me start with some basics.
23 The FHA claims still survive, right?

24 MS. HAMILTON: Don't survive?

25 THE COURT: They do survive.

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1 MS. HAMILTON: They -- under Leblanc?

2 THE COURT: Yes.

3 MS. HAMILTON: They could survive. Yes.

4 THE COURT: Okay. Well, so that means they do
5 survive unless you are going to tell me that Leblanc was
6 dicta too.

7 MS. HAMILTON: Aspects of it.

8 THE COURT: Okay. Facial challenges. First
9 Amendment challenges, equal protection challenges, why don't
10 those survive --

11 MS. HAMILTON: Well --

12 THE COURT: -- and have facial challenges?

13 MS. HAMILTON: Well, for the same reason. The
14 issue here --

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15 THE COURT: Facial challenges are when the law is
16 adopted it's unconstitutional, period.

17 MS. HAMILTON: On its face.

18 THE COURT: Yes.

19 MS. HAMILTON: Well, I mean, our argument there is
20 that they have failed to state a claim.

21 THE COURT: Okay. But we will get to that.

22 But even if you are right on ripeness, because they
23 haven't submitted one application, then, at most, what that
24 does is take out the as-applied challenges.

25 MS. HAMILTON: It takes out all of the

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1 constitutional and RLUIPA as-applied challenges.

2 THE COURT: Okay. So leaving the facial challenges
3 under the First and Fourteenth, the First and Fourteenth
4 Amendment, as well as RLUIPA --

5 MS. HAMILTON: Under -- right. I mean taking us
6 to the --

7 THE COURT: -- and FHA.

8 MS. HAMILTON: Right. Which takes us to the
9 standing issues.

10 THE COURT: Okay. So, is there anything else you
11 want to discuss about -- in terms of ripeness?

12 MS. HAMILTON: No. I mean, the only thing I would
13 add is just to refer the Court back to the S & R Development
14 decision which we sent in.

15 THE COURT: I've got it. I have read it.

16 MS. HAMILTON: The new decision in Miles Christi,
17 which is very much on target, which is in the United States

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18 District Court for the Eastern District of Michigan, which
19 is -- it says, "a case is unripe without filing of a single
20 application."

21 THE COURT: Okay. What's that cite again?

22 MS. HAMILTON: It is 2009, U.S. District LEXIS
23 36228, decided on April 30th.

24 THE COURT: Eastern Michigan?

25 MS. HAMILTON: Eastern District of Michigan, yes.

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1 THE COURT: So we are going to pooh-pooh the Ninth
2 Circuit, but we are going to embrace the Eastern District of
3 Michigan?

4 MS. HAMILTON: Well, no. I love the Ninth Circuit.
5 They refused futility unless there is an application. The
6 Ninth Circuit is fine by me.

7 THE COURT: Okay. All right. Standing.

8 MS. HAMILTON: Standing. The question with respect
9 to standing is where is the injury, and it's difficult for
10 the plaintiffs to argue that they have been injured when
11 nobody knows what it is that they want. In addition --

12 THE COURT: Well, but that's just back to your
13 ripeness argument.

14 MS. HAMILTON: Well, it's, it -- those are the
15 facts in this case.

16 THE COURT: What they want is to build and develop
17 and operate the rabbinical college.

18 MS. HAMILTON: But that's not -- to desire a
19 rabbinical college is incomprehensible in a land use
20 universe. A land use application does not say "we want a

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21 rabbinical college." It says, "we want the following uses
22 that are permitted under your Code and those that aren't. We
23 want schools. We want libraries," dah-dah dah-dah dah-dah.
24 So they have a list of uses that they want and we
25 have no idea how many libraries do they want. We don't have

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1 any idea what size of the institution that they want.
2 They say that facially dorms cannot possibly work
3 out for them, but there is no application for any dorms of
4 any kind. We have no idea what kind of dorms they want. All
5 we know is that they say that their faith involves people
6 being married and having children, but that doesn't answer
7 the question of the land use issue.

8 So it's hard to argue that there is an injury here
9 that justifies Federal Court jurisdiction until the local
10 government has had some chance to rule. So, ripeness and
11 standing really blend into each other because of the facts of
12 the case, not because of anything the defendants have done.

13 THE COURT: So, let's assume for the sake of
14 argument they have asked for the amendment, the amendment
15 gets turned down. Why, why then don't they have standing?

16 MS. HAMILTON: Well, the problem with standing then
17 is the question of causation, whether or not the local
18 government's decision caused what their constitutional claims
19 are. I mean there is no causation right now, but if they are
20 claiming there is discrimination, they have got to show that
21 the decision by the government was discriminatory. And so
22 how do we know causation --

23 THE COURT: But that gets back to whether or not

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24 they state a claim. I mean we've got -- the carts and the
25 horses are all mixed up now. But, for example, you concede

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1 that even if you are right on the ripeness claim, that the
2 FHA claim survives and there are facial challenges that still
3 survive, and getting at least to whether or not they state a
4 claim. But why don't they have standing at least to argue
5 that they do state a claim?

6 MS. HAMILTON: Well, I guess we will start from the
7 bottom up. With respect to the individuals --

8 THE COURT: Okay.

9 MS. HAMILTON: The individuals --

10 THE COURT: The students and the teachers.

11 MS. HAMILTON: The prospective students and
12 teachers for a prospective school.

13 THE COURT: Yes.

14 MS. HAMILTON: They can't possibly have standing if
15 all they are is theoretically prospective. I mean that takes
16 hypotheticals to a new level. And, so, the question is, is
17 who would have standing.

18 The only -- arguably, the only arguable group
19 that's got standing is the rabbinical college. Kolel Belz
20 argues that they should have standing just because there
21 aren't enough rabbinical judges. Well, that is not specific
22 enough to justify a Federal Court intervening.

23 THE COURT: I mean what do you -- well, hang on.

24 Let's get back to the individuals.

25 what do we do, for example, with the Village

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1 Arlington Heights? It specifically held that an individual
2 had standing where that person sought to live in a planned
3 housing community that hadn't been built yet. I mean, isn't
4 that what this is?

5 MS. HAMILTON: It's -- this seems one step removed,
6 in the sense that these are individuals that may or may not
7 ever become involved with this school. I mean, there's,
8 there's no --

9 THE COURT: But rabbinical -- I gather, we are told
10 they are in as teachers and students. They have -- it's been
11 decided. So, before the school is built, they have had their
12 first acceptance letters go out and they have picked their
13 faculty. That's not so outrageous.

14 The Village of Arlington Heights says the same
15 thing. Somebody who is a prospective tenant, in a
16 development that hasn't been built yet, has standing to
17 challenge the local community's, you know, getting in the way
18 of the building of that, of that community.

19 MS. HAMILTON: Well, I mean, that has to do with
20 the claims in that case.

21 The claims in this case are -- all rest on land
22 use, and the question is, who has standing with respect to
23 the various claims under -- for land use purposes. Under
24 RLUIPA, the plain language is that only the land owner has
25 standing in these cases. The other co-religionists don't

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1 have standing.

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2 THE COURT: Okay. But there is more claims than
3 just RLUIPA here.

4 MS. HAMILTON: Well, but, but --

5 THE COURT: I understand.

6 MS. HAMILTON: It's one of the major elements of
7 their Complaint. And, so, if they don't have standing with
8 respect to RLUIPA, that part of the lawsuit drops out for
9 now.

10 THE COURT: Well, only as to the individuals.

11 MS. HAMILTON: The facial challenges --

12 THE COURT: The land owner gets, gets to press
13 ahead under RLUIPA, correct?

14 MS. HAMILTON: Right, but only the land owner.

15 THE COURT: Yes.

16 MS. HAMILTON: Only the rabbinical college, and not
17 any of the individuals, and not any of the entities that say
18 that they have an interest in having this kind of entity
19 built.

20 THE COURT: Yes.

21 MS. HAMILTON: So that takes us back to the
22 rabbinical college.

23 THE COURT: Okay.

24 MS. HAMILTON: And with respect to standing for the
25 rabbinical college --

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1 THE COURT: Well, I suppose it keeps the
2 individuals' constitutional claims alive though.

3 MS. HAMILTON: I think it's hard to say that their
4 constitutional claims are alive. It will be one thing if

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5 they were accepted into the school as you have hypothesized.

6 THE COURT: But the Village of Arlington Heights
7 the person, I mean it's like, "I plan to live in this hole in
8 the ground that hasn't been, you know, developed yet because
9 of improper conduct by local officials." The Supreme Court,
10 not in dicta, says that's standing.

11 MS. HAMILTON: I think -- okay, okay. I'll back
12 off on that one for now.

13 THE COURT: Okay.

14 MS. HAMILTON: For now.

15 THE COURT: For now.

16 MS. HAMILTON: For the moment.

17 THE COURT: All right. So you want to get back to
18 then the college.

19 MS. HAMILTON: Yes. The problem with standing
20 right now is redressability. The question would be: If
21 there is no plan, but in fact they are asking for
22 redressability in this case, I guess, I suppose what they
23 would have to do is give you the plan and let you act as the
24 Zoning Board, and either decide they get everything they ask
25 for, because they asked for it and they're religious, or --

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1 THE COURT: I want season tickets.

2 Okay. Go ahead.

3 MS. HAMILTON: I'll pretend I didn't hear that.

4 THE COURT: It's on the record, you know. The
5 whole world heard it. It's a joke.

6 Go ahead, Ms. Hamilton.

7 MS. HAMILTON: Okay. You have totally derailed me
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8 now.

9 THE COURT: I'm sorry.

10 MS. HAMILTON: That's okay. If they have a plan --
11 which I assume they do, since they alleged that they have
12 asked a lot of experts about a plan.

13 If they have a plan, which is not in the Amended
14 Complaint, they would have to present it to you and you will
15 have two choices. You can either say, "you get everything
16 you want," which is what is being asked, or you can say,
17 "well, let me go back and look at what the local zoning rules
18 are and I will figure out which of these uses are consistent
19 with the local Zoning Code and which are not, and I will go
20 through and I will craft the result that will be the
21 appropriate result under the land use Code and for your
22 interests."

23 That's -- that is such a deep violation of the
24 Federal Judge's relationship to local land use law, it's
25 stunning. There is no way for a Federal Court to provide

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1 adequate redress under the facts of this case right now.

2 THE COURT: Well, except, what if -- maybe at most
3 plaintiffs can get in that scenario is a declaratory judgment
4 that the relevant provisions of the zoning law are
5 unconstitutional and violate RLUIPA. And then that takes you
6 back to where everything was before these were adopted and
7 then they go and they make their applications to the town.

8 So maybe they don't get a judgment for millions of
9 dollars, but they get these provisions thrown out.

10 MS. HAMILTON: And --

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11 THE COURT: Either on the basis of a facial
12 challenge or on an as-applied challenge. And then, and
13 then -- which is, they are happy with that, at least to some
14 extent, because they feel like, "okay, we now have a set of
15 rules that we can live with, that are fair, and then we can
16 go ahead and make our proposal."

17 MS. HAMILTON: But they still have to show standing
18 with respect to the facial challenges. I don't understand,
19 on the facts of this case -- say, say they were to prevail on
20 the -- on a single constitutional claim, you are saying that
21 the remedy would be to remove that from the Code and then to
22 send the whole case back to the local government?

23 THE COURT: Put it this way. If the State of New
24 York passed a law tomorrow which said that -- and I'm going
25 to make this -- take it way out of any context of this case,

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1 but said that "every New York Mets fan will no longer be
2 allowed to work in a job and earn a salary more than \$2 an
3 hour," let's say. Okay. And that's a facially invalid
4 statute and Mets fans would unite and say, "that's
5 unconstitutional." They wouldn't be here saying, "and, by
6 the way, make me the CEO of Citibank."

7 They are saying, "throw out that law and we will
8 get the job we get. But you can't, as a matter of equal
9 protection analysis, pass that kind of law in New York
10 State." So, what's wrong with that?

11 MS. HAMILTON: I am still trying to understand how
12 you would figure out that they have standing with respect to
13 any particular provision of the Code, because you don't know

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14 if the plan relates to that provision of the Code.

15 THE COURT: But the Complaint -- why, why can't it
16 be said that the Complaint says enough about what they want
17 to do with the property that they have bought; that the
18 specific number of dorms is really not the point, it's the
19 fact that they can't construct the dorms they want, and that
20 they think that that provision is unconstitutional or
21 violates RLUIPA on its face?

22 MS. HAMILTON: Because this is a classic example of
23 a generalized grievance which Lujan said is, is inadequate
24 for standing.

25 THE COURT: But Lujan is, you know, people saying,

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1 "Oh, we don't want bad things to happen to the environment."

2 This is a very specific piece of property. This
3 isn't, this isn't a bunch of plaintiffs saying, "boy, it
4 would really be nice if maybe someday we can buy some
5 property and this would, this would prevent us from even
6 thinking about buying property."

7 The claim here is, "we bought the property, then
8 all of these rules were adopted to prevent us from doing what
9 everybody knows we want to do with the property."

10 MS. HAMILTON: Well, first of all, who knows?

11 They say at one point that no one knows what they
12 want to do.

13 THE COURT: Who is they? I'm sorry.

14 MS. HAMILTON: The Second Amended Complaint.

15 THE COURT: Okay. Because you were pointing to
16 co-counsel.

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17 MS. HAMILTON: On Paragraph 169, I think.

18 No. Let me -- they say outright that the
19 defendants have acted here in a total vacuum of any
20 information about the plans for the rabbinical college.

21 THE COURT: I'm sorry. Where are you?

22 MS. HAMILTON: It was Paragraph 185, under --

23 THE COURT: Yes. Okay.

24 MS. HAMILTON: You got it?

25 THE COURT: I got it.

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1 MS. HAMILTON: So, they allege that the defendants'
2 conduct was made in a total vacuum of any information about
3 the plans for the rabbinical college. And then they claim
4 there are certain zoning rules that they have standing to
5 challenge facially, but how can they have standing when
6 nobody knows what they want to do?

7 It's not enough to say -- let's say they don't want
8 to build a rabbinical college. Let's say they want to build
9 a hotel. There are a vast variety of hotels out in the
10 world.

11 THE COURT: You know, you took my hypo. I was
12 going to use that question.

13 MS. HAMILTON: Well, there you go.

14 THE COURT: There you go.

15 Get ready to answer that question, counsel.

16 MS. HAMILTON: Okay. Well, then, you know.

17 So, the question is, if they come in and they say
18 that they want to build a hotel, they can build a tiny
19 bungalow or they can build a 14-story building, and those are

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20 radically different land use impacts, and who knows which
21 parts of the Code would apply to whatever it is that they are
22 going to propose. The same is true here.

23 They themselves said there are no other rabbinical
24 colleges like this in the country. We have got no template
25 to figure out what's a standard rabbinical college. At least

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1 if it were Wake Forest University, we can ask them, "is it a
2 small, medium or large typical university?"

3 Here, it is something that has not been done before
4 and everyone is operating in the dark. So for them to
5 claim -- to cherry pick certain provisions of the regulations
6 that they don't like is not enough. That's just a
7 generalized grievance. That is not adequate injury in fact
8 to give them the power to invoke federal jurisdiction in
9 order to get a ruling on the law.

10 THE COURT: Okay. Anything else on standing?

11 MS. HAMILTON: Nothing else on standing for the
12 moment.

13 And, finally, I mean, obviously, we have made
14 arguments with respect to stating a claim. I don't know if
15 you want to get into those now or --

16 THE COURT: Sure. Let's do it.

17 MS. HAMILTON: Okay. The question about stating a
18 claim and the sufficiency of the Complaint, as I have said
19 repeatedly, and maybe I'm already done with this argument, is
20 that it is not enough, according to the Supreme Court, that
21 the facts pled are merely consistent with potential
22 liability. It's not enough to quote beg phrases and then

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23 say, "well, that will be consistent with discrimination."
24 what the Supreme Court said is you need more facts than that.

25 THE COURT: You are back to Iqbal again.

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1 MS. HAMILTON: I'm back to Iqbal and the reversal
2 of the Second Circuit. I mean --

3 THE COURT: Look, I am not the Second Circuit. So
4 they got reversed.

5 MS. HAMILTON: I mean, you are controlled by the
6 Second Circuit.

7 THE COURT: I am controlled by the Second Circuit,
8 but until the Supreme Court reverses them. I am controlled
9 by the Second Circuit.

10 MS. HAMILTON: Right. But my point is, we have all
11 been briefing in light of pre-Iqbal rules created by the
12 Second Circuit. Now we have a different arena where the
13 Second Circuit has been reversed and we have a new standard.

14 THE COURT: Okay. I don't think the plaintiffs
15 cited Iqbal other than maybe they repeated the standard in
16 Twombly, which is what we all used to cite Iqbal for.

17 MS. HAMILTON: And that's what's rejected in Iqbal.

18 THE COURT: Well, no, no, no, no, no, no, no, no.

19 MS. HAMILTON: They say Twombly is not enough. You
20 have to be careful about it.

21 THE COURT: Well, no, I -- I know. But the Supreme
22 Court didn't eviscerate Twombly. I am just saying that
23 plaintiffs didn't cite Iqbal saying "our Complaint is
24 sufficient because we did what the plaintiffs did in Iqbal."
25 So the fact that Iqbal got reversed, I don't see how that

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1 really matters here.

2 MS. HAMILTON: Well, but the Court says that
3 Twombly is not enough to understand the sufficiency of a
4 Complaint, and goes out of its way to say that this standard
5 now applies to every civil Complaint ever filed.

6 THE COURT: I know. But what it comes down to is
7 that the plaintiffs in Iqbal didn't allege enough facts to
8 put Ashcroft and Mueller on the hook.

9 MS. HAMILTON: And that's our position, that the
10 facts that are alleged are thin at best. If you take out the
11 allegations against surrounding communities and the private
12 individuals --

13 THE COURT: Mm-hmm.

14 MS. HAMILTON: -- you are left with a very, very
15 thin Complaint, virtually nothing.

16 THE COURT: Okay.

17 MS. HAMILTON: So that's --

18 THE COURT: Okay. I mean, look, I don't think I
19 need Iqbal to tell me that allegations as to surrounding
20 communities that aren't sued here is enough to state a claim
21 as to those who were sued.

22 MS. HAMILTON: Okay.

23 THE COURT: So I'm with you.

24 MS. HAMILTON: It works for me.

25 THE COURT: Okay. Anything else?

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1 MS. HAMILTON: Not for now.

2 THE COURT: All right. Thank you very much.

3 MS. HAMILTON: Thank you, Your Honor.

4 THE COURT: All right. Who is going to speak on
5 behalf of plaintiffs.

6 MR. STORZER: I will, Your Honor. I've never
7 started out an argument doing this, but if the Court would
8 give me a little bit of leeway, starting with the legislative
9 history here.

10 THE COURT: Okay.

11 MR. STORZER: Not, not what I usually want to do.
12 But the joint statement of Senators Hatch and Kennedy, when
13 they passed the law, really reflects a lot of the issues that
14 are going on here, when they said that RLUIPA was not
15 intended -- and this provision is quoted all the time by
16 municipalities in these cases.

17 "RLUIPA was not intended to relieve religious
18 institutions from applying for variances, special permits or
19 exceptions, where available, without discrimination or unfair
20 delay." And there are at least four important points in that
21 statement there that the law bears out, as, as well as the
22 legislative history of that particular statute.

23 The first one is -- and I think the Court hinted at
24 this pretty clearly. The only thing that the rabbinical
25 college can do here is ask to change the law. There's

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1 nothing else. The defendants have repeatedly said in court
2 today and in their filings, in letters back and forth between

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3 counsel, that there is -- there are no administrative
4 procedures by which the rabbinical college can build what
5 they need to build.

6 The williamson case and its progeny talk about
7 administrative efforts. There are no administrative efforts.
8 There are -- I guess if you want to characterize it a
9 legislative history.

10 THE COURT: But, see, but that -- when I started
11 that argument, I wondered how much of that is semantics,
12 because at the end of the day, the law that we are dealing
13 with here is all part of 130, right?

14 I mean, it's, at least in theory -- putting aside
15 the wetlands for a second.

16 MR. STORZER: Section 130, zoning.

17 THE COURT: Yes. So we are talking about zoning,
18 and there are a number of different ways it seems that people
19 who want to do something with their property, they either
20 convince the town that what they are doing comports with the
21 zoning requirements or that the zoning requirements shouldn't
22 apply. And you can do that by getting a variance, you can do
23 that -- which you guys can't get here, and everybody
24 acknowledges you can't get a variance here. But other people
25 might be able to get a variance and then other people can try

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1 to get special use --

2 MR. STORZER: Correct.

3 THE COURT: -- permits. And what's available to
4 you is an amendment, which you go to the town and you say,
5 "we don't think that this zoning provision should apply here,

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6 we want you to amend it for these purposes," and you get a
7 yeah or a nay.

8 And, by the way, you go to them and you say, "and
9 this is why we want it amended, and this is what we intend to
10 do," and they say yes or no, and then you are done.

11 MR. STORZER: That would create -- no court in, in
12 the entire history of ripeness law that I've been able to
13 come up with, and we did our research, has ever held that
14 legislative remedies, which is what this is -- the Court was
15 provided with various different New York cases that stand for
16 the firm proposition that text amendments, zone changes,
17 whatever you want to call it -- zone change is kind of a
18 misnomer. We can't change it to another zone. There is only
19 one zone that permits this here. It's not like there's an
20 educational zone that we can ask to be rezoned to.

21 we would have to change various provisions of the
22 zoning ordinance to the Village's Code, its, its legislation,
23 to say something different than what they say today. And
24 if -- you know, if we want to start a -- if the Court wants
25 to create a precedent that suggests that one has to petition

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1 Congress to change a statute, a federal statute that is
2 discretionary before anybody has standing to challenge such
3 a discriminatory statute in court, then, then that certainly
4 would be -- it would, it would be new law.

5 But this is, this is --

6 THE COURT: Well, I'm really stuck there, because
7 Ms. Hamilton has a similar sort of absolutist position, which
8 is that no court has ever said futility was established

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9 without at least one application, so.

10 MR. STORZER: I believe --

11 THE COURT: Either way, I am going to get reversed
12 here, so --

13 MR. STORZER: I believe that the Lucas case --

14 THE COURT: -- let's flip a coin.

15 MR. STORZER: I believe that the Lucas case itself
16 was, was an example of, of a situation where --

17 THE COURT: Okay.

18 MR. STORZER: -- there was never any application
19 and there was futility.

20 THE COURT: So your -- so the bottom line is
21 Article 11, you say, doesn't change anything, because Article
22 11 is a legislative fix.

23 MR. STORZER: There is absolutely no basis for the
24 argument that one has to petition a legislature -- a
25 legislative body to change the law before one gets standing.

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1 THE COURT: Okay. What about the point that, at
2 least in terms of the pleadings, at least in terms of what
3 the town knows, what do you guys want to do with the land?

4 MR. STORZER: That's -- that -- and this is, this
5 is --

6 THE COURT: I mean it's not wrong that there is a,
7 there is a federalism component to this, where, you know,
8 towns do have -- traditionally have always had some ability,
9 some substantial ability to govern the zoning in the town.

10 MR. STORZER: Absolutely.

11 THE COURT: And, so, if they want to not have a

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12 McDonald's in the town, I mean, they will not have a
13 McDonald's in the town. McDonald's can, you know, try to
14 change that.

15 But federal courts coming in and saying, "no, you
16 have to let plaintiffs do what they want," and the town says,
17 "well, we don't know what they want," and the truth is we
18 don't know what you want. I mean, I have rough outlines, but
19 the specifics -- the devil is often in the details -- nobody
20 knows at this point.

21 MR. STORZER: Okay.

22 THE COURT: So, what would you have me do at the
23 end of the day? There is this lawsuit. What do you want out
24 of this?

25 MR. STORZER: What we want at the end of this

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1 lawsuit is very simple, and it's not the parade of horrors
2 outlined by opposing counsel here, that somehow you would be
3 ruling on setbacks and variances and utilities and all of
4 that. That deserves to be in the local land use process.

5 We want -- we don't want to be exempt from the
6 process. We want to have a fair process. We want the Court
7 to enjoin the application or through a declaratory judgment
8 stating that the ordinances that were specifically passed to
9 keep this use out are not effective, and that we can apply
10 for a special exception, which this village does.

11 And, again, the argument that this is Little
12 Pomona -- I believe was the phrase that was used in their
13 briefs. This village allows colleges. It allows
14 dormitories. You can have Wake Forest there if you want to.

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15 You are just not allowed to have a college that has the types
16 of dormitories that this protected class of individuals
17 requires in what they want to do. So we were willing to
18 apply for special exception.

19 Of course, at this point, we would seek the Court's
20 continuing jurisdiction to oversee this process, because we
21 are pretty clear where that would end up, given the amount of
22 discretionary, discretionary judgments and decisions that
23 have to be made by any local body.

24 THE COURT: So, basically, either you get what you
25 want in terms of the rabbinical college or they are breaking

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1 the law?

2 MR. STORZER: We seek a -- we seek the right to get
3 a special exception under the Village's Code.

4 THE COURT: But what if they say no, and they say,
5 "we don't want to, we don't want to do this"?

6 Putting aside these ordinances that you are
7 challenging. They just say, "look, it's a residential
8 community. We don't want something this big. If you want to
9 do something that's a hundred students, that's fine."

10 At the end of the day, is it -- you know, I don't
11 know what the ideal plan is.

12 MR. STORZER: As Your Honor, as Your Honor said,
13 if, if, if I'm a Mets fan, I want the opportunity to go and
14 find a job. We want the opportunity to apply for this
15 special exception. We think that under the nondiscriminatory
16 ordinance provisions --

17 THE COURT: So you want the job. I mean that's the

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18 fallacy of my, of my analogy, is that, you know, at the end
19 of the day, you can make it the Wake Forest College and Hotel
20 and they don't get to say no.

21 MR. STORZER: That, that is not our position.
22 That's not what we are requesting in the Complaint. We are
23 requesting the chance to apply, the chance to apply under a
24 fair process.

25 If, at the end of the day, the application was

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1 denied on grounds that we believe weren't justified, then
2 that may be the subject of another action.

3 THE COURT: What will be justifiable grounds? What
4 will be justifiable grounds?

5 MR. STORZER: The special exception factors that
6 would exist under, under local and state law.

7 THE COURT: Okay. Such as?

8 I mean, why isn't density relevant here?

9 MR. STORZER: I believe that --

10 THE COURT: I mean, the town population is what,
11 3,000?

12 MR. SAVAD: Roughly \$3,200.

13 THE COURT: 3,200. So, if they are going to have a
14 thousand people living and working, as has been represented
15 to me -- that may be an exaggeration, that's fine -- but
16 that's a third of the population of the town, you are
17 increasing it, and there are traffic ramifications, there is
18 utilities, there is esthetics. What --

19 MR. STORZER: Your Honor, the Village's Code talks
20 about these things in a very objective manner. It states the

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21 amount of land that can be used as a percentage of total
22 land that can be used by a college by total square footage,
23 by dormitories. This is all described in the Complaint. We
24 are willing to live with the nondiscriminatory non-burdensome
25 elements of the Zoning Code that allow this specific use and

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1 then allow dormitories themselves.

2 Now, can the Village deny any use whatsoever
3 regardless of how small?

4 If we are talking about 750, 500, 250 students,
5 based on a general concern that one more car is going to add
6 too much traffic, or one percent utilization of the property
7 is going to be too much density for the Village, that's
8 something that's going to be challengeable either under
9 State law or potentially under Federal law, but we are not
10 at that stage yet.

11 We completely agree with, with opposing counsel
12 that when it comes to these kinds of details, that has to be
13 worked out in the local process. There is more than enough
14 here to demonstrate that there should -- there should be some
15 oversight of that process.

16 THE COURT: I guess -- I mean, you know, the thing
17 is that the town to this day -- I mean, Paragraph 185 is not
18 a helpful paragraph for you. Because what you do is, you
19 basically say, "the town has acted improperly here precisely
20 because they don't know what we're doing. They just said
21 no." And, so, the "in a vacuum" line, I am not sure why
22 that's a good fact for you to allege.

23 MR. STORZER: I, I wrote that paragraph, so I will

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24 take the blame for it. But what I meant when I wrote that
25 paragraph was --

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1 THE COURT: Thinking more legislative history?

2 MR. STORZER: -- was the, was the site plan that
3 was presented to -- I believe leaked by Preserve Ramapo,
4 these are the goods. The specific plans for the buildings
5 and the roads --

6 THE COURT: Okay.

7 MR. STORZER: -- not the generalized plans --

8 THE COURT: Leaked, leaked, what do you mean
9 leaked?

10 I mean, every day we read the media about leaks to
11 the web that turn out to be utterly false.

12 MR. STORZER: The, the -- we believe that the
13 village obtained the plans for -- certain plans, really the
14 concept plans.

15 THE COURT: The village did, the village officials?

16 MR. STORZER: Village officials.

17 THE COURT: Obtained the plans?

18 MR. STORZER: Obtained certain -- not from us.

19 THE COURT: Engineering studies, I heard that. We
20 all heard that.

21 MR. SAVAD: If I may, Your Honor.

22 THE COURT: Yes.

23 MR. SAVAD: Paul Savad.

24 THE COURT: Yes.

25 MR. SAVAD: In connection with any land use, we

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1 have SEQRA, and SEQRA is a process which, by the way, in
2 connection with the text amendment, the Village and Ms. Ulman
3 could tell you this, can drag on for four or five years, and
4 in the Complaint they have alleged they can do that.

5 THE COURT: Let's get back to the leak.

6 MR. SAVAD: Leaving that aside --

7 THE COURT: Yes.

8 MR. SAVAD: What our planners did is prepare --
9 under SEQRA you have to do a maximum buildout. In other
10 words, take your property and take, for example, the maximum
11 amount of number of units that you can build on that
12 property.

13 Although, we -- in our, in our first phase, and as
14 we allege in our Complaint and my letters to Ms. Ulman, we
15 want 250 students, we did a hypothetical plan, as required
16 under State law, under SEQRA, showing a thousand units. That
17 thousand units was sent by our planning consultants, right
18 here in Westchester, to the -- to the County agency, to the
19 County agency, traffic and a few other agencies.

20 We didn't even know they sent it. We were working
21 on SEQRA. We spent hundreds of thousands of dollars to get
22 this 4-inch book done and, all of the sudden, we hear that
23 it's leaked. Well, the leak was our planning consultant
24 sent it out for comment by County agencies, so it became a
25 public record. So the leak is not exactly a leak.

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1 So, based on knowing that there conceivably could
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2 be one-thousand units, then, one month after we purchased it,
3 I start going to public hearings, all these things come out.

4 wetlands, which apply only to us, because they
5 exempt residential dormitories, which cannot accommodate --

6 THE COURT: Why does it apply to only you?

7 MR. SAVAD: It exempts residential --

8 THE COURT: Hang on.

9 MR. SAVAD: -- by its terms.

10 THE COURT: I understand that. But I'm told that
11 the town allows for dormitories and colleges and museums and
12 libraries, and presumably wetlands would apply in those
13 instances, right?

14 MR. SAVAD: Well, but there is nothing left to
15 build on.

16 THE COURT: Yes or no?

17 MR. SAVAD: Yes, but there's no land left. There's
18 no land left.

19 THE COURT: I know, but how can we say on its face,
20 if the wetlands provisions apply to nonresidential and the
21 zoning ordinances allow for nonresidential buildings, that
22 somehow that that violates?

23 MR. SAVAD: Yeah, that's fact-specific. I can
24 tell you --

25 THE COURT: On its face, as a facial challenge, how

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1 is that unconstitutional or violates RLUIPA?

2 MR. SAVAD: That, that ordinance, Your Honor -- and
3 I was at every public hearing and I had to go with security
4 to attend these meetings.

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5 At each of those meetings, the tenor was to pass
6 things to stop us, and those were the comments made in
7 connection with the adoption; it's the wetlands; it's the --
8 which only applies to us. It wouldn't apply to a 10,000 or a
9 5,000 square foot house, but it would apply to a 5,000
10 church, synagogue, or mosque. But yet that didn't apply --

11 THE COURT: Or a museum or a library.

12 MR. SAVAD: Or a museum or a library, but there is
13 no land left in the Village for it.

14 THE COURT: People can buy land I would assume.

15 MR. SAVAD: No, it's all built up. It's zoned
16 R-40. It's zoned R-40.

17 And R-100, now 130 acres, by its very nature, by
18 the -- precisely in the ordinance says "you can have a
19 college. You can have a college."

20 So, all these concerns about traffic and everything
21 are dealt with by professionals, and they're objective. I've
22 never seen a case where ultimately the town or Village
23 engineers, the County engineer and the engineers for the
24 applicant don't all agree that it's good for traffic, or
25 there is bad drainage, or all of the sudden these

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1 environmentalists come out of the woodwork, but those are
2 independent scientific standards.

3 In this particular case, and to make it really
4 simple, we want the same rights to apply for a college, just
5 take out the word accredited, because the students sitting
6 here -- and this is the class, part of the class, and five of
7 these people here are the plaintiffs, they want the right to

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8 attend a college. And under their religious mandates what
9 they study and what they learn, what they inculcate into
10 themselves 24 hours a day cannot be done unless they live
11 there with their families, and culturally and biblically to
12 have children and multiply.

13 And what we say is, they intentionally targeted
14 this once this plan came out and all this happened. If we
15 were to apply for a text amendment, Doris and I agree, we
16 will be there four, five years later.

17 If you look at Paragraph 206 -- just look at
18 Paragraph 206. This is Mayor Sanderson's --

19 THE COURT: I'm sorry. 206 of what?

20 MR. SAVAD: Of the Complaint.

21 THE COURT: Okay.

22 MR. SAVAD: This is Mayor Sanderson's dream. This
23 was made in 2007. He has a vision of Pomona -- 2006.
24 "The year is 2011," and "the State Environmental Quality
25 Review Act process is almost finished."

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1 They're talking about us. That means they have
2 already planned ahead, in 2007, to have us stuck in the text
3 amendment process, which is completely discretionary. They
4 don't have to take out -- they don't have to change the law,
5 and keep us stuck for four years.

6 THE COURT: You know, politicians say they are not
7 going to run for reelection and they do.

8 MR. SAVAD: Yeah, but this is --

9 THE COURT: They say they are not going to run for
10 president and they do.

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11 MR. SAVAD: Well, so they're saying this, but he
12 won't do it. Look at Paragraph --

13 THE COURT: I mean -- first of all, I mean, I have
14 to say, I mean I went through this. This is precisely, I
15 wanted to get an education on, because one of the things I
16 was concerned about reading your allegations was, "hey, you
17 know, it's not ripe. They have got to go through the process
18 and the process is quicksand." I get that.

19 But in reading Article 11, it specifically says in
20 Section 130-39 that if you don't act on it in 45 days, then
21 it's adopted, the amendment.

22 MR. SAVAD: No.

23 THE COURT: And there are similar provisions
24 under -- okay. Tell me why I'm wrong.

25 MR. SAVAD: Because under SEQRA, they can send it

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1 out for years. More and more they declare --

2 THE COURT: But SEQRA, as I understand it, is a
3 State law.

4 MR. SAVAD: No. They can drag it.

5 THE COURT: Is SEQRA a State law?

6 MS. ULMAN: Yes.

7 MR. SAVAD: Yes.

8 THE COURT: Okay. First of all --

9 MR. SAVAD: But the -- I'm sorry.

10 THE COURT: Please, let's calm down. There is no
11 reason to wag a finger at me.

12 MR. SAVAD: Oh, I'm sorry, Your Honor.

13 THE COURT: SEQRA is not under attack in this
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14 lawsuit.

15 MR. SAVAD: But the Village can use the process --

16 THE COURT: Okay. But if my aunt had a beard, she
17 would be my uncle. Okay. We are not here to talk about the
18 what ifs. We are not here to talk about SEQRA.

19 We are here to talk about the things the Village
20 has done, the laws that they have adopted, that you say
21 violate various constitutional and statutory provisions. I
22 am with you on that.

23 MR. SAVAD: Yes.

24 THE COURT: Let's put SEQRA to the side, because we
25 are not even at SEQRA because you haven't submitted a plan.

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1 SEQRA only comes in when you have submitted a plan.

2 MR. SAVAD: I know that and I understand that.

3 THE COURT: That's Ms. Hamilton's point, is that
4 land use is a process, and she is not wrong. Even outside
5 the Ninth Circuit it's a process.

6 You go to a town and you say, "this is what we want
7 to do with our property. And there is a town ordinance that
8 says you can only have, you know, white shingles. We want
9 purple shingles," and you seek a variance, okay. And there
10 is no SEQRA involved in that, obviously, maybe there is,
11 but -- okay. So here your plan leaked. They reacted by
12 passing all these ordinances, but we still don't know what
13 the plan is.

14 MR. SAVAD: But if we have to apply for a text
15 amendment, because we are not accredited, we are being
16 treated differently than those institutions that can be

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17 accredited, therefore, we go right into quicksand. We go
18 into a text amendment which can be discretionary with the
19 Village and they can simply deny it.

20 THE COURT: Right. And then you come to me and you
21 say "it's ripe."

22 MR. SAVAD: But first we have to go through four
23 years of SEQRA before they deny it.

24 THE COURT: You keep bringing in SEQRA.

25 MR. SAVAD: Because they'll use that process.

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1 THE COURT: Okay.

2 MR. SAVAD: We are willing to do it, just take out
3 the word accredited.

4 MR. STORZER: Your Honor, some of us have been
5 living with this a long time.

6 THE COURT: Believe me, I get that, and I respect
7 the passion that is governing the lawyers' conduct.

8 AS I said, I very much appreciate the briefing
9 that's been done on this. It's been excellent and very
10 helpful. But I also recognize that there is a lot of
11 emotions out there on this, so I just want to make sure that
12 we keep them in check here. Go ahead.

13 MR. STORZER: The issue of a text amendment getting
14 an up or down vote in 45 days, I am not a land use lawyer
15 myself, but I am pretty certain that that is not the case.
16 It wasn't an issue. It wasn't brought up in the motions. We
17 would, we would be happy to address that if that was --

18 THE COURT: Well, your point is, you have addressed
19 it, that it's a legislative fix, and that the ripeness

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20 doctrine here doesn't --

21 MR. STORZER: Frankly, I simply have to say that I
22 can't imagine anything but a bright line saying "you don't
23 have to attempt to seek to petition a legislative body to
24 change a law before you have standing to challenge that law."
25 And, again, there is absolutely no precedent that can support

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1 such a position.

2 THE COURT: I mean, as I said, you know, in
3 thinking about the argument and defendants' position that it
4 wasn't ripe, I was cognizant of the allegations in that
5 statement in Paragraph 206 of, you know, from plaintiffs'
6 standpoint, this is a war of attrition.

7 And from plaintiffs' standpoint, and it's alleged
8 in the Complaint, it's, it's, "hey, look, you know, the camp
9 never got anywhere and they gave up and sold the property.
10 So, maybe the name of the game here is just drag this thing
11 out until plaintiffs give up, they run out of money, whatever
12 it is." I get that, and I get that, that there may be
13 constitutional implications from that, but the law on
14 ripeness is what it is.

15 The Second Circuit has laid out the four reasons as
16 to why that doctrine applies, and part of it is so there is a
17 record as to what it is that's being sought in terms of the
18 land use and what happened to that request. Courts like
19 facts and they need -- they don't decide cases in the
20 abstract. And what you don't get out of this lawsuit is
21 plaintiffs have a right to do something with the land.

22 I take it from your answer that's not what you are

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23 asking for, but that is the concern here, is that I'm not,
24 I'm not a Zoning Board either. Okay. So, that's why I asked
25 the question I asked about what it is that you at the end of

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1 the day think you can get out of this lawsuit.

2 MR. STORZER: Your Honor, the Complaint is clear
3 as to what we are seeking in general terms. We are seeking a
4 college. We are seeking a dormitory that can accommodate
5 these individuals.

6 The actual plans, whatever, again, once again,
7 williamson and everything that came after williamson talks
8 about administrative relief. There is, there is no
9 possibility for any administrative relief at all.

10 what are we seeking?

11 we are not seeking a building permit that gets
12 signed off on by the Court. We are seeking the right to
13 apply under a fair process. We don't have a fair process.

14 Towards the end of, of defense counsel's argument,
15 you made the suggestion of a declaratory judgment speaking to
16 those specific ordinances that we say either both -- either
17 and both discriminate against us, as well as substantially
18 burden our religious exercise, and that's exactly what we are
19 seeking, the right to be able to go through the process
20 without discrimination and without undue delay. The, the --

21 THE COURT: But, see, I guess, at the end of the
22 day, though, if the town -- you know, if you wanted to build
23 a giant widget factory there, and you represented a widget
24 company --

25 MR. STORZER: Yes.

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1 THE COURT: -- and the town just says, "we don't
2 want a widget factory on that -- you know, in our town, so
3 we're not gonna, we're not gonna grant you a variance."
4 Does the town have a right to do that?

5 MR. STORZER: The town would have -- would not have
6 the right, to use the Court's example, to say, "you are
7 allowed to have factories in town, but you are not allowed to
8 have factories that build dreams."

9 This is what's happening here. You are allowed to
10 have colleges. You are allowed to have dormitories.

11 They gerrymandered their zoning ordinance in a
12 specific way to keep out a specific class of people. This
13 is, at the very least, the Complaint certainly alleges these
14 kinds of facts. We believe that there are ample facts to
15 support that allegation.

16 THE COURT: Why don't you, why don't you go ahead
17 and address that point, because Ms. Hamilton says a lot of
18 what's in your Amended Complaint has to do with other towns
19 and other people, and, you know, anonymous people who say
20 things in the newspaper, but at the end of the day these are
21 not the decisionmakers.

22 MR. STORZER: With the, with the Court's
23 permission, I would like to leave that argument to my
24 co-counsel, John Stepanovich.

25 THE COURT: Yes. Sure.

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1 MR. STEPANOVICH: Thank you, Your Honor. The
2 earlier quote from Paragraph 166, I think, was from Mayor
3 Marshall and he lost the election. He got beat.

4 I think what's really relevant is the statements
5 from those officials that won the election. And I would
6 point to the campaign literature from Candidates Sanderson,
7 Yagel and Louie, that's at our Paragraph 178, Exhibit 12,
8 where they have an unwavering --

9 THE COURT: Paragraph 178 in the Complaint, right?

10 MR. STEPANOVICH: 178 in the Second Amended
11 Complaint, Exhibit 12.

12 That they have an unwavering long-term commitment
13 to the Village. "To protect the Village, you must vote for a
14 team that is prepared to stand up to this threat. A team
15 that's in it for the long-term, that has already prepared
16 themselves with a strategy to win this fight for Pomona."

17 THE COURT: Right.

18 MR. STEPANOVICH: Campaign material from Candidate
19 Sanderson, at 179, Exhibit 10. "We are facing a proposal
20 that could completely change the Village and the makeup of
21 the Village. My experience and my passion will help this
22 Village and allow this Village to fight this proposed
23 development."

24 Candidate Sanderson, at a -- actually, I think he
25 was elected Mayor by that point. At a public meeting, before

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1 Pomona's Civic Association. We've set this forth in Exhibit
2 N, Laura Kraemer's affidavit. "Several things have to be

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3 done to prepare for this looming crisis."

4 THE COURT: I don't mean to be a stickler, but I
5 am. We have got to go off what's in the Complaint.

6 MR. STEPANOVICH: I understand.

7 THE COURT: Okay.

8 MR. STEPANOVICH: Then we will, we will move on to
9 the --

10 THE COURT: Well, some of this is in 178.

11 MR. STEPANOVICH: Yeah. And let me just -- it's in
12 there, Your Honor.

13 Let me just expand on what Mr. Savad was trying to
14 say in terms of his recitation of the letter to the editor.
15 That's in our Complaint at Paragraph 206. And I understand
16 you indicated politicians say one thing and do another,
17 but I think this is very clear.

18 His "I had a vision" speech. "The year is 2011."

19 THE COURT: Oh, the cynicism.

20 MR. STEPANOVICH: "During the last Village Board
21 meeting before the village election... Next is a report
22 about the Tartikov development. The State Environmental
23 Quality Review Act process is almost finished. The Village
24 Board will soon receive the application to make a decision
25 on granting a special permit for the huge development, or

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1 deny it. The Board knows that if it is denied a Religious
2 Land Use and Institutionalized Persons Act lawsuit will
3 follow. Fortunately, the Board has had a strong legal team
4 in place for the last four years and is well-prepared to
5 fight for the Village.

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6 "A resident asks if taxes will be going up this
7 year. She (the Village treasurer) replies that the legal
8 defense fund created four years ago is almost \$1 million
9 ahead of target, so no tax increase is foreseen. There is
10 a murmur from the appreciative audience."

11 THE COURT: Bully for Ms. Hamilton, a million
12 bucks.

13 MR. STEPANOVICH: Great. God bless her. It's
14 great work if you can get it, Judge. But here's the point.

15 THE COURT: Yeah, I got it.

16 MR. STEPANOVICH: These are not conclusory
17 allegations. These are not our words. These are their
18 words. This legislation that's targeted against our clients
19 and the predecessors in interest, it's, it's -- we're not
20 making this up, Judge, it's there.

21 And I will say that there is -- the law is clear
22 that we are not required to jump through a series of hoops,
23 the last being obstructed by a brick wall. But, Your Honor,
24 I think the facts are sufficiently clear that the brick wall
25 is built, it's there.

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1 And I would point to, whatchamacallit, the
2 attachment, the letter back and forth between Mr. Savad and
3 Ms. Ulman. I believe it's Exhibit 18 to the Second Amended
4 Complaint. I think it's particularly telling. And it is
5 her letter dated May 14th, the second paragraph. "I do not
6 understand why you would request any meeting to discuss the
7 design of a project that is illegal." That, Your Honor,
8 comes from the Village Attorney, a predetermination of our

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9 project being illegal.

10 Now, how are they going to ever approve a project
11 that she has already determined to be illegal?

12 If that's not digging in your heels and if that is
13 not absolute --

14 THE COURT: But isn't the point to the process that
15 you would convince them it's not illegal?

16 Isn't that the whole idea behind going to a Zoning
17 Board and saying, "you know, you may think that this is
18 illegal, but it's not, and here is why it's not"?

19 I mean, again, assuming there were a variance,
20 which there is not, but -- "and, in any event, if it doesn't
21 comport with the zoning regulations, here is why you should
22 not apply them."

23 MR. STEPANOVICH: In a perfect world, that's
24 absolutely true, Your Honor. We're not in a perfect world,
25 we're in Pomona, and the facts -- our obligation under

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1 futility is prove lack of administrative discretion, which
2 Mr. Storzer has dealt with, or whether or not they have dug
3 in their heels to make it perfectly clear that any
4 application will ever be approved.

5 That determination where she claims it's illegal,
6 on top of all of the other statements, all of the other
7 words, makes it perfectly clear that they have dug in their
8 heels.

9 THE COURT: Okay. But what about, what about
10 Ms. Hamilton's point?

11 I mean, are you aware of a case where a court

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12 applied futility where there was not a single application?

13 MR. STEPANOVICH: We think that's, that's Lucas v.
14 South Carolina, addressed by counsel. And --

15 THE COURT: Okay. Other than Lucas, though, no
16 other cases, correct?

17 MR. STEPANOVICH: That's the Supreme Court, Your
18 Honor.

19 THE COURT: You waive that around like it matters.

20 MR. STEPANOVICH: Well, I'm, I'm sure the Court
21 understands.

22 THE COURT: I forget the name of the decision.
23 There is the Judge Bianco decision where the Mayor said,
24 basically, "now, this is illegal" or "don't bother me with
25 this," and there Judge Bianco -- don't say any things about

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1 him, I went to law school with him -- said, "that's not
2 enough, he can change his mind, you never know."

3 I mean, you know, I suppose on some level, if I
4 thought about it rationally, I would have thought my wife
5 would have said no, but I asked anyways.

6 MR. STEPANOVICH: Well, I think that, I think that
7 that case will be appropriate and I'm sure Your Honor agrees
8 with that.

9 THE COURT: Okay. All right. Go ahead.

10 MR. STORZER: Your Honor, along those lines as
11 well, I think that we are kind of ignoring the elephant in
12 the tent here, which is the Leblanc case. We have nearly
13 identically the same situation here as they had there. They
14 had a zoning ordinance which was passed. It was never

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15 applied. I believe in that case there was actually something
16 that they could have applied for. The, the --

17 THE COURT: But isn't that -- but that's FHA,
18 right?

19 MR. STORZER: No. That was a First Amendment case
20 as well, Your Honor.

21 THE COURT: Okay.

22 MR. STORZER: And the Court held that both, that --

23 THE COURT: You're right. You're right.

24 MR. STORZER: Right.

25 THE COURT: But it's certainly in timing it's

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1 previous to RLUIPA, so it's not an RLUIPA case.

2 MR. STORZER: It's not an RLUIPA case, but it
3 postdates Williamson. So, to the extent that the Supreme
4 Court suggested that one needs to seek administrative
5 remedies, there was no such requirement from the Second
6 Circuit, and there is nothing that overrules that.

7 We had a very similar, we had a very similar
8 situation there. We had evidence of private parties that
9 were, that were hostile to the same protected class of
10 individuals. That evidence was held to be -- could support
11 the jury's verdict that there was discrimination here.

12 We had the Fair Housing Act claims, the same types
13 of -- we had the same types of claims, although, RLUIPA was
14 not passed yet, at that point, and ripeness was a, ripeness
15 was a major issue to that court.

16 The Court looked at all of this evidence, the
17 totality of the circumstances, discriminatory intent, whether

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the law bears more heavily on one group than another, the historical background of the situation -- of the decision, looked at temporal facts, the specific sequence of events leading up to the challenged decision, contemporary statements made by the members of the decisionmaking body.

I mean we have statements here that talk -- you know, the, the talk about the makeup of the village, protecting cultural and religious diversity in the village.

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How does cultural and religious diversity relate to density?

we have counsel for the village telling a group of people assembled not to cave in and sell, sell your houses to them. who are the them in that situation?

These -- there is -- we are not talking about random block postings made by people three villages over. we are talking about the village's own officials, people running for office, who are eventually elected to office and other village officials.

The Leblanc, the Leblanc court definitely looked at that sort of evidence and said not only that it was ripe, but it was sufficient to uphold the jury's verdict.

THE COURT: But I'm trying to find where -- I mean I have read Leblanc a couple of times, although, it's been a couple of days. I am trying to find where there is a discussion of Williamson.

MR. STORZER: In Leblanc, at Page 425, Your Honor. "A person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit."

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THE COURT: That's FHA, right?

22 MR. STORZER: The same analysis was, was extended
23 to the --

24 THE COURT: Well, but let's get to that. The First
25 Amendment claims are picked up at 426, right?

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1 MR. STORZER: At 426. "In determining whether a
2 law is based on religious animus, the same kinds of evidence
3 noted above with respect to a disparate treatment claim under
4 the FHA are relevant."

5 It analyzed the same evidence and extended --

6 THE COURT: But it doesn't deal with Williamson,
7 right?

8 There is no discussion of Williamson at all in
9 Leblanc.

10 MR. STORZER: That, I would have to review it
11 again. I don't believe so.

12 THE COURT: Yeah, I don't remember Williamson.

13 MR. STORZER: Again, ripeness was an issue.

14 In the actual discussion, the court specifically
15 noted that the village itself had done nothing but adopt its
16 own Code and had not yet been called upon to apply it.

17 THE COURT: Yes, I do remember that.

18 MR. STEPANOVICH: This is controlling.

19 THE COURT: No, it's dicta.

20 Okay. Okay. No. You are right. I think Leblanc
21 has a lot to say here.

22 MR. STORZER: The, the challenge to laws that are
23 passed can be -- it's kind of a strange duck. If a law is

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24 passed with discriminatory motive, is it a facial challenge;
25 is it an as-applied challenge? The courts are divided on

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1 the issue.

2 THE COURT: And how. I have actually been
3 wrestling with that a lot. I mean, they are kind of all over
4 the map. Because generally speaking a facial challenge, you
5 don't deal with motive, except when it's an equal protection
6 claim.

7 MR. STORZER: Right.

8 THE COURT: And then --

9 MR. STORZER: Or a First Amendment claim.

10 THE COURT: Well, sort of.

11 MR. STORZER: The City of Hialeah case.

12 THE COURT: Yes, but even that's -- right. But
13 First Amendment in terms of speech or First Amendment in
14 terms of all pieces of the First Amendment?

15 MR. STORZER: The Church of the Lukumi Babalu Aye
16 v. City of Hialeah, free exercise.

17 THE COURT: Free exercise, right.

18 MR. STORZER: And I believe it was Justice
19 Kennedy --

20 THE COURT: Kennedy concurring.

21 MR. STORZER: -- concurring. And that specific
22 section was relied upon by the Second Circuit in --

23 THE COURT: Right. In Leblanc, right.

24 MR. STORZER: So that, that reasoning was adopted,
25 Your Honor, to the extent. Whether the -- whether that's --

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1 THE COURT: It still seems a lot like an as-applied
2 analysis even in Leblanc, because they are relying on the
3 facts, and they are putting into context the public
4 commentary and the reaction to certain statements that are
5 made and the pressure that's put on town officials.

6 MR. STORZER: Right.

7 THE COURT: So, it's not just an analysis of the
8 statute and saying, "well, on its face, it seems okay, but."
9 It's, it's -- I agree, it's a fine line.

10 MR. STORZER: And the courts look at it
11 differently.

12 THE COURT: What about RLUIPA, though?

13 I mean, RLUIPA is looking at -- if all you have
14 left is a facial challenge under RLUIPA, what's your argument
15 that Hialeah and Leblanc together in terms of the governing
16 principles means that you can look at motive or a facial
17 challenge under RLUIPA?

18 MR. STORZER: Certainly, there is, there is plenty
19 of precedent that supports that.

20 But with respect first to ripeness, RLUIPA has a
21 specific provision that even if -- that states that standing
22 is to be governed only by the general rules of standing under
23 Article III, similar to the FHA's -- the gloss that's been
24 put on the FHA by the Supreme Court, that there are no --
25 there are absolutely no considerations of prudential

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1 standing. This is an Article III, is there injury, causation
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2 or redressability.

3 A lot of the discussion as to ripeness comes from
4 pre-RLUIPA, free exercise cases that talk about prudential
5 considerations that just aren't in play here.

6 THE COURT: Before we leave the question of
7 standing, one thing that Ms. Hamilton and I did not discuss,
8 but I would like you to address is -- forgive me if I get the
9 pronunciation wrong, but the standing of Kolel Belz.

10 MR. STORZER: Right.

11 THE COURT: What, what will be the argument there?

12 MR. STORZER: The Kolel Belz is another religious
13 institution. They have themselves about -- it's a specific
14 sect. They have about 200 members. They have no vest in.
15 They have -- they don't have the individuals that this
16 proposed rabbinical college will train to be rabbinical
17 judges for that particular group of Orthodox Jews. The hope
18 is that some of the Kolel Belz students will be able to study
19 at this college and then be able to return.

20 THE COURT: Are these among the students that have
21 been admitted?

22 MR. STORZER: Yes, they have been admitted.

23 THE COURT: Okay. So, but why can't they assert
24 standing on their own?

25 MR. STORZER: They do.

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1 THE COURT: Okay. So --

2 MR. STORZER: In -- we believe -- this is not
3 simply a situation where somebody is concerned about the
4 plight of tigers in Africa. This is a group that needs a

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5 specific type of educated individual that they don't have
6 access to and that this --

7 THE COURT: But I thought the case law said, if you
8 want to go ahead and try to assert third-party standing, you
9 need to, among other things, establish a barrier to the
10 individual injured party's ability to redress the wrong. But
11 here the individual students who have been admitted, you
12 would say, have standing, okay --

13 MR. STORZER: Yes.

14 THE COURT: -- so that should end it.

15 why, why do we need the whole organization then
16 to assert standing on their behalf when they can do it, they
17 can do it themselves?

18 MR. STORZER: There is an important relationship,
19 as a practical matter, between the two entities. Obviously,
20 the case doesn't turn on this.

21 THE COURT: I didn't mean to suggest it was.

22 MR. STORZER: But there is the ACORN v. County of
23 Nassau case, which was, which was cited to the Court.

24 THE COURT: Yes.

25 MR. STORZER: That gave an advocacy group that

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1 endeavors to fight discriminatory local and State government
2 decisions, had standing in that case, although, none of them
3 were specifically seeking housing themselves, but this could
4 be seen as falling under that category.

5 THE COURT: Or by virtue of the distinction not
6 falling under it, because you have got the individual
7 plaintiffs who are asserting their interests.

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8 MR. STORZER: Correct.

9 THE COURT: Okay. All right. I mean, it's not a
10 big deal, but just before we left the topic of standing.

11 MR. STORZER: All right.

12 THE COURT: Okay. What else would you like to
13 cover?

14 MR. STORZER: Well, getting back to the, to the
15 remedy that, that was one of the Court's first questions,
16 this is why we submitted the Reaching Hearts decision that
17 came out of the District of Maryland, because in that case,
18 it was alleged that a specific ordinance was passed to keep a
19 specific church out of, out of the jurisdiction.

20 When the, when the court ruled that their rights
21 under RLUIPA were violated, the relief that the court granted
22 was a, basically, a declaration that that particular
23 ordinance itself was invalid and to go forward in the land
24 use process without that, which is exactly what we are
25 seeking here. So, this isn't something that's unprecedented or

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1 even -- unprecedented or even uncommon.

2 The, the -- I'm not sure that the, that the
3 defendants' standing arguments or even 12(b)(6) arguments
4 really do anything more than restate the ripeness arguments
5 themselves. If the Court doesn't have anything further on --

6 THE COURT: Well, I have read what you have all
7 said on whether or not you state a claim under 12(b)(6), and
8 we have all surveilled the case law nationwide on this. But,
9 again, if there is anything else you wanted to add to your
10 papers, now will be your time.

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11 MR. STORZER: Well, I would, I would end by saying,
12 again, this, this, this case is about a -- you know, at the
13 end of the day, it's about a clash, a clash of cultures that
14 is happening in this village, it's happening all around the
15 County, as the Court is well-aware.

16 One of the -- one of the elements -- one of the
17 allegations of the Complaint is that Pomona has joined a
18 lawsuit against the Town of Ramapo specifically to keep
19 out -- I believe that --

20 THE COURT: Oh, I know all about that, because we
21 have a case that was removed.

22 MR. STORZER: I understand that, Your Honor.

23 THE COURT: And we have another case where we have
24 a motion pending there as well. So, yes, I got you.

25 MR. STORZER: I am not sure if the Village has

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1 litigated other cases against the town in other circumstances
2 that don't involve this class of individuals, but, again,
3 that's -- there is a clash of cultures here.

4 The Mayor talks about the makeup of the village,
5 about protecting cultural and religious diversity. The
6 zoning law, the zoning process, the text amendment process,
7 the passing of new ordinances should not be the battle ground
8 on which these cultural issues have been fought, and,
9 unfortunately, that's what's happening here in Pomona.
10 That's why Congress passed RLUIPA.

11 Congress said RLUIPA shall be, shall be applied in
12 the broadest possible fashion, and the standing provision of
13 RLUIPA says it's only limited by Article III itself. So, to

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14 the extent that there is any discretion on the part of this
15 Court to -- it has to be made to err on the side of
16 protecting religious freedom.

17 THE COURT: Okay. Thank you very much.

18 MR. STORZER: Thank you, Your Honor.

19 MR. STEPANOVICH: Your Honor, before we left
20 standing, are you okay on the FHA standing?

21 THE COURT: I am square on FHA.

22 MR. STEPANOVICH: Okay. One response. I guess
23 Ms. Hamilton said S and R Development, and that was a
24 reasonable accommodation of FHA claim. That's different than
25 a disparate impact claim. I just wanted to point that out.

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1 THE COURT: Okay.

2 MR. STEPANOVICH: Thank you.

3 MR. SAVAD: One more thing, Judge.

4 THE COURT: Yes.

5 MR. SAVAD: If you will recall, on March 20th,
6 there was a hearing before you in Chofetz Chaim v. the
7 Village of Wesley Hills. Pomona was in there. And there
8 were two attorneys appearing there. There was -- Mr. Haspel
9 was for the plaintiff and you had Mr. Zarin for Wesley Hills,
10 and you had Mr. Saracino for the Village of Pomona.

11 And in the record, Mr. Zarin said -- because he
12 said the Chofetz Chaim case is very thin, they are just
13 alleging racial or something of that sort. And he said, "at
14 the end of the day" -- this is at Page 27 in your court
15 record, "I would submit, Your Honor, that these
16 municipalities could not keep these types of developments

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17 from happening in their municipalities, religious, any
18 religious or educational institution from locating in
19 municipalities under the common law of New York and RLUIPA,
20 and that this was made very clear in Mamaroneck. They do
21 have that right, Your Honor."

22 And then he said, speaking for the villages,
23 including Pomona, "and we didn't do anything, the villages,
24 out of those normal procedures. It wasn't like New
25 Hempstead. We weren't sending out false information. We

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1 weren't putting out pamphlets, Your Honor, saying this is the
2 worst thing that's ever going to happen. We were putting up
3 a new slate for development to stop this project. There is
4 no literature that we tried to stop the project."

5 So, I agree with Pomona and Wesley Hills' attorney
6 that that is the standard, that that is what's happening
7 here, and I think he must've read our Complaint when he was
8 attending the argument for this Court to dismiss the Chofetz
9 Chaim case.

10 Yes, there are emotions, but if one reads the
11 Complaint, one reads the motions, one reads the exhibits,
12 what these young men want is what any other young man in the
13 United States wants, the right to have an education.

14 These are all ordained rabbis, they don't need an
15 accredited school to behave like proper students, and all we
16 need is a level playing field. Take out the word
17 accreditation, take out these laws that not -- environmental,
18 the environmental law takes off ten acres from our property.
19 It only applies to our property. It's a factual

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20 determination.

21 The -- to put it before, before they changed the
22 law, it was only up till age 12th Grade, and what happened
23 was, they realized --

24 THE COURT: In terms of a school that you can have?

25 MR. SAVAD: Yes, only up to twelfth grade. But as

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1 soon as -- they were dealing with Yeshiva of Spring Valley,
2 which they dragged through the dirt for five years. I
3 represented them in their new project, which they received
4 approval for in the town in one year.

5 And, so, they changed -- as soon as we bought it
6 and the deed is recorded, Rabbinical College of Tartikov,
7 exactly one month later, I'm at a meeting and all these --
8 these are the facts on the ground -- all these targeted laws
9 were passed.

10 We are not asking for anything that preempts
11 zoning. We are not asking for anything that takes us out of
12 RLUIPA. What we are asking for is this Court under RLUIPA
13 to level the playing field, to fashion a remedy in which we
14 can apply and be treated just the way Wake, Wake College
15 would be treated, and all of these things, these objective
16 things are being determined by land planners.

17 Look, if the County engineer says there's
18 insufficient water drainage or the like, then the project
19 engineer will ultimately agree. All those things, like in
20 Mamaroneck, were all dealt with and eventually all of the
21 professionals agreed and what was left was the pure
22 discrimination, to the point that after the trial the second

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23 time around, the judge wrote an airtight decision.

24 what we are asking is -- we bought this property.

25 Our client paid \$12 million for a college property in 2004.

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1 what we are asking for is the right to apply, and my learned
2 counsel that deal in this area, FHA and RLUIPA, they can deal
3 with the technicalities.

4 But we know that you are familiar with what's going
5 on in this region more than any other Judge. The cases are
6 before you. And I think this is the right case to make the
7 right remedy and let them take it to the Second Circuit, but
8 we think this is the right case and that what we are doing is
9 legitimate.

10 One last thing I want to say. Our first phase is
11 250 students. This is not a housing project. All we -- it's
12 pled in the Complaint that these students will receive
13 subsidies from between 12 and \$2,400 a month.

14 This is a real college and we want the right to
15 prove it, that we are a real college, and we want the right
16 to utilize the State process with a level playing field by
17 Your Honor's decision.

18 THE COURT: Yes, I know. But when you said the
19 word "first phase," I'm sure that drew some attention, so.

20 Ms. Hamilton, I will give you the last word.

21 MS. HAMILTON: Okay. If Ms. Ulman could just make
22 a brief statement about the statements they said about her.

23 THE COURT: Sure. Yes, of course.

24 MS. ULMAN: Your Honor, I just wanted to clarify.

25 THE COURT: Yes.

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1 MS. ULMAN: The letter that was referred to by
2 Mr. Stepanovich was after a conversation between Mr. Savad
3 and myself, at which time we both agreed that the so-called
4 college not being accredited was not in compliance with the
5 Village Law. And Mr. Savad was asking for a private meeting
6 to discuss that, and my comment was, "there's no point in
7 having a private meeting, because it's not going to
8 accomplish anything. Apply for the zone change, and then the
9 village can" --

10 THE COURT: But they can't get it. They need an
11 amendment, not a zone change, right?

12 They need an amendment.

13 MS. ULMAN: They need an amendment, yes.

14 THE COURT: Okay. Okay.

15 MS. ULMAN: It would be an amendment to one of our
16 laws, yes.

17 THE COURT: All right. Well, let's pick up on
18 that, Ms. Hamilton, because the question is whether it's one
19 of semantics or is it really what defeats your argument on
20 ripeness. That -- you know, put it this way. I think maybe
21 another way plaintiffs will phrase it, if the New York State
22 legislature passes an invalid law, the fact that you could,
23 you know, say "let's have a do-over on the law" doesn't mean
24 that the people can't challenge the constitutionality of the
25 law. And that really Article 11 is not a zone change, it's

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1 not a variance, it's not SUP. It is "go back to the
2 legislative body of the town and change the law." And, you
3 know, is that really, is that covered by Williamson and
4 Murphy and so forth?

5 MS. HAMILTON: Yes, Your Honor, I think it is just
6 semantic. I mean, it is the sort of application that's made
7 in communities in New York all the time. It is not an
8 unusual request. It's certainly not a requirement. You go
9 up to Albany and you persuade all of the assemblymen and all
10 of the senators to do what you like. It's a local
11 determination in light of local values.

12 I mean, what we are talking about here is
13 federalism and the ability of local communities to determine
14 if they are going to be bedroom communities or factory
15 communities.

16 I mean the question is -- what they are suggesting
17 is that federal law completely sets aside not just the laws
18 that are inconsistent with certain aspects of RLUIPA, but
19 sets aside the whole process. So, I mean, we just go back to
20 the same thing over and over.

21 THE COURT: Let me play devil's advocate for a
22 second. First of all, you haven't made a Tenth Amendment
23 challenge to RLUIPA, and such challenges haven't fared very
24 well. So, I don't really know that's really the point here.

25 The point here is that RLUIPA is on the books. I

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1 didn't draft it, I didn't pass it, neither did you. It's on
2 the books, it's got to be enforced. And what they're saying

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3 is, is that what RLUIPA bars is land use regulations that
4 discriminate against people based on religion.

5 what they want wiped away are those provisions of
6 the zoning ordinances that have been adopted since the
7 property was purchased, and then, then have the process.
8 That's what they're saying.

9 They are not saying, "Judge, order the town to
10 allow us to build a college the way we wanted, with a first
11 phase, second phase, third phase." They want a process.
12 Right now there is no process, because they look at the law
13 and the law says forget about it, and unless they can amend
14 the law, they're stuck.

15 MS. HAMILTON: well, they can amend the law in
16 light of public interest, which is to say, which is something
17 they often forget, that the public is involved in public
18 hearings for a text amendment.

19 This is not -- the process is not that they go in
20 and the legislators unilaterally decide, "well, do we like it
21 or not?" The public has an opportunity for input for the
22 intensity of the use that's being proposed here, which is
23 unlike any other prior use.

24 So they are opposing the process. They are not
25 just opposing the law but the whole process. What they

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1 really want, and you can see that in the Complaint, is they
2 want to go through the process with a Federal Court on their
3 arm. And they want to be able to say at every turn not just
4 "we will file an RLUIPA lawsuit against you," which is the
5 normal mode of operation, but rather, "we have filed our

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lawsuit and it's sitting right here with the Judge watching everything you do." And with respect to federalism principles, that takes RLUIPA extremely far.

THE COURT: And the flip side of it is, you have got a Mayor who says, "I have a vision, and it's 2000-never, and this thing still hasn't happened, because we have thrown up every hurdle we can. We are paying Ms. Hamilton a million bucks." And, by the way, you are worth more than that. And, you know -- and, so, that's what they are dealing with.

MS. HAMILTON: My co-counsel gets a few pennies too.

THE COURT: I mean, it is, it is -- it's what obviously makes this a very challenging case, because there are very important values on both sides of the equation. And that's -- and I understand, counsel made the point that you have been living with this case, and I realize people in the community and people who want to be in the community, and I really appreciate counsel setting what I think is a very important tone to this dialogue for those in the back, seeing that counsel are approaching this with vigor and passion but

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not crossing any lines. So I get it, and I get that the Federal Courts shouldn't be running towns. I get that.

MS. HAMILTON: Well -- and if you look at the relief sought, they don't simply ask for an application; they ask for the ability to get the application, the construction, and the utilization of the college.

THE COURT: That doesn't mean they are going to get what they ask for. As the Rolling Stones said, "you don't

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9 always get what you want."

10 MS. HAMILTON: No, I understand that.

11 There is two other things. Reaching Hearts
12 involved a case where there were three applications, not
13 zero. And with respect to the constitutionality of RLUIPA,
14 we are not at the summary judgment motions yet, Your Honor.

15 THE COURT: Oh. So you are still waiving that
16 stick around later on.

17 MS. HAMILTON: Oh, yes.

18 THE COURT: Okay. Well, you were the RLUIPA expert
19 that's been discussed in the pleadings.

20 MS. HAMILTON: Yes, I know.

21 THE COURT: Hang on. I just want to make sure
22 Ms. Hamilton doesn't have anything else.

23 MS. HAMILTON: And with respect to Mamaroneck, of
24 course, a plan was filed. In Mamaroneck, there was --

25 THE COURT: No. I understand. These cases are

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1 being cited for different points.

2 MS. HAMILTON: I understand that.

3 THE COURT: So --

4 MS. HAMILTON: There just isn't another case where
5 no application needs to be made --

6 THE COURT: No. There's the case.

7 MS. HAMILTON: -- for RLUIPA or --

8 THE COURT: There is the one. There is the one.

9 MS. HAMILTON: Lucas?

10 THE COURT: Yes.

11 MS. HAMILTON: I have to go reread it, but I don't

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12 remember it being a futility exception to ripeness.

13 THE COURT: Okay. All right. Okay. We will both
14 reread it.

15 MS. HAMILTON: But, in any event, the --

16 THE COURT: What do you do with Leblanc? What
17 about Leblanc?

18 MS. HAMILTON: I think Leblanc is problematic for
19 our position, we know that.

20 THE COURT: Okay.

21 MS. HAMILTON: Which is why I was willing to say
22 that the Fair Housing Act claims are potentially problematic.

23 THE COURT: But Leblanc is also First Amendment,
24 it's true.

25 MS. HAMILTON: It is First Amendment, but it is

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1 speech. And the argument in that case or taken from the case
2 is you can't let speech claims sit, but we are dealing with
3 conduct here, not speech. We are dealing with buildings.

4 THE COURT: Okay. I didn't understand Leblanc to
5 be limited to speech.

6 MS. HAMILTON: Well, the statement they make about
7 going beyond -- that they need to go forward has to do with
8 the standard argument under the First Amendment.

9 THE COURT: I mean, it specifically addresses free
10 exercise on Page 426 in Leblanc, citing Hialeah.

11 MS. HAMILTON: Well, that's with respect to a
12 disparate treatment claim where you have evidence of actions
13 that are going to affect the plaintiffs.

14 THE COURT: Right.

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15 MS. HAMILTON: What actions are going to affect the
16 plaintiffs here? We don't know.

17 THE COURT: But, see, in Leblanc, there was the
18 adoption of the rules that were never actually applied.

19 MS. HAMILTON: In a context where there was a jury
20 trial and there was evidence adduced of discrimination.
21 Here, we --

22 THE COURT: But not, but not because an application
23 was made and denied.

24 MS. HAMILTON: No, no, not because an application
25 was made and denied, but there was evidence of discrimination

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1 in that case.

2 THE COURT: Okay.

3 MS. HAMILTON: Our argument is --

4 THE COURT: Discrimination in the adoption of the
5 rules that were under attack.

6 MS. HAMILTON: Right, right.

7 THE COURT: Okay. But you heard what plaintiffs'
8 counsel said about their allegations.

9 MS. HAMILTON: If you read the allegations, that's
10 not what these allegations -- these allegations do not allege
11 facts about discrimination with respect to the laws that were
12 passed.

13 AS Ms. Ulman stated, they were working on the
14 school issue before that. It's the same provision you see
15 across the State of New York. It's going to be very hard for
16 them to argue that any of the changes in the law which
17 liberalized the rules were passed in order to limit them.

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18 They are in a better position after those
19 amendments than they were before. And that's why Ms. Ulman
20 said she doesn't understand how there can be an argument they
21 were passed for discriminatory motives.
22 What their argument is, is that they didn't do
23 everything to make sure that they got everything they wanted.
24 That can't be a right. That's not a constitutional right.
25 It's not an RLUIPA right.

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1 THE COURT: Okay. All right. Anything else?
2 MS. HAMILTON: That's it. Thank you, Your Honor.
3 THE COURT: Real quick. I have given you all two
4 hours.
5 MR. STEPANOVICH: The district court in Leblanc-
6 Sternberg did address the ripeness issue on the allegations
7 of the Complaint. The district court --
8 THE COURT: Right. But that was early on in
9 pretrial, right?
10 MR. STEPANOVICH: Right. Exactly.
11 THE COURT: Yes, yes. But that -- and I guess
12 that's my point, though, that Leblanc in this circuit doesn't
13 go through a Williamson analysis, right?
14 I realize the district court -- back when the
15 district court was ruling in favor of the plaintiffs in that
16 case, there was an early decision, as I recall.
17 MR. STORZER: We have -- again, Leblanc and this
18 case are different, because you are dealing with ordinances
19 that were passed with a discriminatory motive, not like
20 Williamson, not like Murphy, not like all of the other cases

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21 cited by the defense in furtherance of their Williamson
22 argument. When you have ordinances that are passed with
23 discriminatory motive, it's different.

24 The only thing that I wanted to leave the Court
25 with was the text of RLUIPA itself. I guess I will end with

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1 reading the text. Each specific substantive provision of
2 RLUIPA begins "no government shall impose or implement a land
3 use regulation; substantial burden discrimination; equal
4 terms." The, the --

5 THE COURT: Yes, but the cases do -- I mean
6 Westchester Day talks about substantial burden really using
7 ripeness terms, that there is no substantial burden unless
8 you have applied and been rejected. I mean, so I get the
9 language. And, you know, starting off by citing the
10 legislative history and ending with reading the text sort of
11 makes you a legal equivalent of bipolar, but I got your
12 point.

13 MR. STORZER: Thank you, Your Honor.

14 THE COURT: Anything else? Again, I want to thank
15 counsel. I recognize -- and I say this to the people in the
16 back. I recognize this is an important decision for all of
17 you. I will do the best I can. We have 400 cases on the
18 civil side, a hundred on the criminal side, but I have spent
19 a lot of time studying this issue. I will get you an opinion
20 as soon as I can, but I want to thank counsel.

21 Again, thank you. Have a good afternoon.

22 MR. STORZER: Thank you, Your Honor.

23 MS. HAMILTON: Thank you, Your Honor.

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MR. STEPANOVICH: Thank you, Your Honor.
25 (Case adjourned)

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